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Singled Out: A Proposal To Extend Asylum to the Unmarried Partners of Chinese Nationals Fleeing the One-Child Policy

Cover Page Footnote

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SINGLED OUT: A PROPOSAL TO EXTEND ASYLUM TO THE UNMARRIED PARTNERS OF CHINESE NATIONALS FLEEING THE ONE-CHILD POLICY

Raina Nortick*

INTRODUCTION

The men with the poison-filled syringe arrived two days before Li Juan's due date. They pinned her down on a bed in a local clinic, she says, and drove the needle into her abdomen until it entered the 9-month-old fetus. "At first, I could feel my child kicking a lot," says the 23-year-old. "Then, after a while, I couldn't feel her moving anymore." Ten hours later, Li delivered the girl she had intended to name Shuang (Bright). The baby was dead. To be absolutely sure, says Li, the officials—from the Linyi region, where she lives, in China's eastern Shandong province—dunked the infant's body for several minutes in a bucket of water beside the bed.¹

Horrific stories of fines, arrests, late-term abortions, and sterilizations abound in China, as people suffer the harsh consequences of violating the country's notorious one-child policy.² But the Chinese government staunchly defends its population control policy as the linchpin to ensuring economic and social development;³ furthermore, officials deny that population control measures are enforced coercively.⁴ Faced with the difficult choice between country and family, many Chinese nationals

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1. Hannah Beech, *Enemies of the State? How Local Officials in China Launched a Brutal Campaign of Forced Abortions and Sterilizations*, Time, Sept. 19, 2005, at 58, available at <http://www.time.com/time/magazine/article/0,9171,1103579-1,00.html>.

2. See *infra* Part I.B.2. The one-child policy generally restricts Chinese families from having more than one child in order to control the country's booming population. See, e.g., Steven W. Mosher, *A Mother's Ordeal: One Woman's Fight Against China's One-Child Policy* (1993).

3. See *Premier Says China to Continue with One-Child Policy*, Associated Press, Dec. 27, 2006, available at http://www.iht.com/articles/ap/2006/12/27/asia/AS_GEN_China_One_Child_Policy.php (describing the one-child policy as key to China's modernization); see also *infra* note 20.

4. See *China: Human Rights Violations and Coercion in One-Child Policy Enforcement: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 50 (2004) [hereinafter *Human Rights Hearing*] (prepared statement of John S. Aird, Former Senior Research Specialist on China, U.S. Census Bureau) (alleging that the Chinese government is well aware of the use of extreme cruelty in enforcing the one-child policy, but claims that the National Family Planning Law prohibits coercion); see also *infra* note 50.

instead flee to the safe haven of the United States and apply for political asylum. Before 1996, victims of the one-child policy were turned away at the border because the U.S. government did not recognize China's population control policy as persecutory.⁵ However, 1996 legislative amendments⁶ to the Immigration and Naturalization Act⁷ reversed this stance on Chinese immigration, broadening the definition of refugee⁸ to include those people forced to undergo abortion or sterilization at the hand of their government's population control regime.

Administrative interpretation of the newly amended immigration law further extended the scope of refugee protection to shield the spouses of one-child policy victims.⁹ If Li Juan managed to smuggle herself to the United States, she could seek asylum after testifying about her frightening experience at the abortion clinic.¹⁰ If Li Juan's legal husband came to the United States—with or without Li Juan herself—he too would find shelter due to the government's violation of his wife. But the United States would be much less welcoming to the father of Li Juan's aborted child if the couple did not, or could not, legally marry in China.¹¹

This Note argues that the couple's marital status should not be the threshold factor in evaluating asylum applications from Chinese nationals fleeing coercive family planning measures. Immigration authorities cannot continue to correlate the seriousness of harm a couple suffers after a forced abortion or sterilization with the legal status of their relationship. Marital status is a convenient but faulty substitute for accurate fact-finding regarding persecution. This Note advocates using marital status as one of many possible ways to prove persecution; it should not be the determinative factor. To avoid arbitrarily denying deserving asylum claims, immigration judges should inspect the closeness of a couple's relationship—married or not—to determine if the physically unharmed partner was nonetheless persecuted by the Chinese government's one-child policy.

5. Before congressional intervention in 1996, the decision of the Board of Immigration Appeals (BIA) *In re Chang*, which denied asylum to an applicant claiming that China's one-child policy in and of itself is coercive and persecutory, was controlling precedent. *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989). Absent a showing that the Chinese government handpicked the applicant for a forced abortion or sterilization, general enforcement of the one-child policy did not meet U.S. asylum criteria. See *infra* note 61 and accompanying text.

6. Illegal Immigrant Reform and Immigration Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2000)).

7. 8 U.S.C. §§ 1101-1537 (2000 & Supp. IV 2004).

8. The Immigration and Naturalization Act defines a refugee as a person outside of his or her country of origin or last residence who is unable or unwilling to return to that country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1101(a)(42)(A).

9. *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919-20 (B.I.A. 1997).

10. See, e.g., *Wang v. Ashcroft*, 341 F.3d 1015, 1023 (9th Cir. 2003) (granting asylum to a female applicant based on two forced abortions she suffered in China).

11. See *infra* Part II.A.1-3.

This Note discusses historical perspectives on China's one-child policy, the current status of the U.S. immigration law governing Chinese refugees, and a proposal for future revisions to asylum law. Part I investigates the origins of the one-child policy, its operation, and its vitality in China today. This part then addresses the various attempts by policymakers in the United States to fashion an asylum remedy for Chinese nationals victimized by coercive population control measures, culminating in the passage of the Illegal Immigrant Reform and Immigration Responsibility Act of 1996 (IIRIRA).¹² Finally, it analyzes the expansion of asylum rights for married couples brought about by the Board of Immigration Appeals' (BIA) landmark decision *In re C-Y-Z*.¹³ However, administrative interpretation of the law may not be determinative. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, circuit courts review administrative decisions using a reasonableness standard, and they ultimately decide whether the BIA's marital status restrictions should carry the force of law.¹⁴ Thus, Part II considers a series of circuit court decisions to discern the status of the law regarding unmarried Chinese refugees applying for asylum after *In re C-Y-Z*. In the majority of these cases, the circuit courts have chosen to defer to the BIA's finding that the IIRIRA provides derivative asylum rights for married couples only. However, a small minority of circuits have found the BIA's marital status restrictions to be arbitrary and ill-defined; consequently, they do not confer *Chevron* deference to the BIA's decision in *In re C-Y-Z*. Part III advocates extending asylum to all Chinese nationals seeking refuge from coercive population control programs, regardless of their marital status. This part rejects traditional arguments for marital status restrictions in favor of a more progressive, merit-based asylum policy.

I. CHINA'S RESTRICTIVE ONE-CHILD POLICY AND A CORRELATING CHANGE IN U.S. ASYLUM LAW

China introduced population control measures in 1979, arguing that its citizens must balance their reproductive rights with their duty to ensure the nation's well-being.¹⁵ The government's justification has not persuaded the

12. Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2000)).

13. 21 I. & N. Dec. 915.

14. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

15. The Programme of Action adopted at the International Conference on Population and Development, held in Cairo, Egypt in 1994, emphasizes that all couples have the right to freely decide how many children they want. United Nations International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action*, ¶ 7.3, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994). The Chinese government acknowledges the basic human right, but argues that its citizens should temper this right with the overriding interests of the nation. See Info. Office of the State Council of the P.R.C., *Family Planning in China*, pt. VII (1995), <http://www.china.org.cn/e-white/familypanning/index.htm> [hereinafter White Paper]. The government thus justifies the one-child policy as a way to ensure that the rights of the many are not trampled by the rights of the individual. *Id.*

international community of the validity of China's one-child policy, and concerns about human rights abuses eventually compelled the United States to craft legal safeguards for the policy's victims. Part I.A examines the one-child policy from its inception to the present day. Part I.B particularly addresses enforcement of the Chinese government's family size restrictions. Part I.C then turns to a discussion of a seven-year effort by U.S. policymakers to create meaningful asylum protection for Chinese nationals fleeing their home country's coercive one-child policy. Part I.D outlines the coercive population control asylum legislation finally passed in 1996. Lastly, Part I.E presents a landmark case in which the BIA expanded asylum rights for Chinese refugees to include not only victims of the one-child policy, but also their spouses.

A. *China's One-Child Policy: Origins, Structure, and Function*

In October 1949, Mao Zedong—China's then-Chairman—proclaimed the establishment of the People's Republic of China,¹⁶ a great nation made greater by its people. Accordingly, Mao adopted a population policy that encouraged couples to have many children.¹⁷ China's population boomed from an estimated 540 million to over 800 million people in only thirty years.¹⁸ But the consequences of unchecked population expansion—which included declining health and living standards, housing shortages, and increased unemployment¹⁹—took a toll on China's ability to develop socially and economically.²⁰ The government needed a systematic plan emphasizing the necessity of sustainable growth—one that would reprogram the nation's priorities. Thus, in 1979 the Chinese government

16. Maurice Meisner, *Mao's China and After: A History of the People's Republic* 50 (3d ed. 1999).

17. Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 Tex. Int'l L.J. 51, 52 (2000). Mao's ideology of "the more people the more power" underscored his population policy. See Lisa B. Gregory, Note, *Examining the Economic Component of China's One-Child Family Policy Under International Law: Your Money or Your Life*, 6 J. Chinese L. 45, 48 (1992). A surge of births would also provide more workers to fuel an economic and industrial revolution; as Mao reasoned, "[e]very mouth comes with two hands." Peter Goodspeed, "Fewer Children—Fewer Burdens": Severe Birth-Control Measures Aim to Curb Demands of Swelling Population, Still Another 64,000 Babies are Born Daily, *Toronto Star*, Jan. 11, 1991, at B1.

18. Nicole M. Skalla, Note, *China's One-Child Policy: Illegal Children and the Family Planning Law*, 30 Brook. J. Int'l L. 329, 332 (2004).

19. The Chinese government has traditionally cited concerns with poverty, infant mortality, and insufficient food and housing supplies in support of the one-child policy. See Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 Yale J.L. & Feminism 145, 150 & n.19 (1996). Propagating a policy that can result in measures as extreme as third trimester abortions and infanticide in order to lower infant mortality rates illuminates the government's conflicted reasoning. See *infra* Part I.B.2.

20. See White Paper, *supra* note 15, pt. I ("From the early 1970s, the Chinese government had become increasingly deeply aware that the over-rapid growth of population was unfavourable to economic and social development and decided to energetically carry out family planning in both urban and rural areas and integrated the plan for population development into the plan of national economic and social development.").

promulgated a one-child policy to rein in population growth.²¹ This section discusses the many facets of China's coercive population control policy.

As its name implies, the one-child policy prohibits couples from having more than one child.²² The policy places stringent conditions on the birth of children. First, couples must be married and must apply for a birth permit before conceiving a child.²³ After giving birth to one child, women must use intrauterine devices (IUDs) to prevent further pregnancies.²⁴ Women must submit to routine pregnancy tests to ensure that the IUD functions properly.²⁵ If a woman becomes pregnant with an unauthorized child, her pregnancy must be terminated.²⁶ Furthermore, one or both parents of multiple children may undergo forced sterilization to prevent the birth of future children.²⁷ Thus, the government heavily regulates all stages of childbirth, from conception to delivery.

21. Elisabeth Croll, *Introduction: Fertility Norms and Family Size in China*, in China's One-Child Family Policy 1, 3, 24 (Elisabeth Croll, Delia Davin & Penny Kane eds., 1985). In 1982, China's population topped one billion. The Chinese government ambitiously hoped to reach zero population growth by the year 2000, or 1.2 billion people, a net increase of only 200 million people over eighteen years. See Penny Kane & Ching Y Choi, *China's One Child Family Policy*, 319 Brit. Med. J. 992, 992 (1999).

22. Croll, *supra* note 21, at 27-28. The name is somewhat of a misnomer as local laws generally allow married couples to have a second child under certain circumstances. For example, a local ordinance in Beijing authorizes married couples to have a second child if (1) their first child is disabled, but not genetically disabled, and cannot become a "normal" laborer; (2) both husband and wife are only children and they have one child; (3) the married couple adopted a child because they thought themselves barren, but later became pregnant; (4) in a second marriage, both husband and wife have only one child; (5) both parents are racial minorities; (6) a rural male marries a female who has no brothers and agrees to support his wife's family in old age; (7) the parents live in a rural area and are injured soldiers; or (8) the parents are farmers living in remote mountains, have only a daughter, and have difficulties that would be alleviated by a second child (presumably a son). Regulation of Beijing Municipality on Population and Family Planning (promulgated by the Standing Comm. People's Cong. of Beijing Municipality, July 18, 2003, effective July 18, 2003), art. 17, translated in LexisNexis, Chinalawinfo Selected PRC Laws [hereinafter Beijing Family Planning Law]. A couple may otherwise apply for governmental permission to have a second child, but the first child must attain a specified age before the second child is born. *Id.* art. 18.

23. 135 Cong. Rec. S8160, 8241 (daily ed. July 19, 1989) (statement of Sen. William Armstrong) (commenting that abortions are mandatory for unwed Chinese mothers because "illegitimacy is illegal"); Skalla, *supra* note 18, at 336.

24. Li, *supra* note 19, at 153 (summarizing provisions of the Hunan and Shandong regions' local family planning regulations).

25. See *Coercive Population Control in China: New Evidence of Forced Abortion and Forced Sterilization: Hearing Before the H. Comm. on Int'l Relations*, 107th Cong. 26 (2001) [hereinafter *Coercive Population Control Hearing*] (prepared statement of Harry Wu, Dir., Laogai Research Found.) (reporting that women in Tianjin municipality must undergo urine tests every three months to ensure that they have not conceived a second child).

26. Li, *supra* note 19, at 153.

27. *Coercive Population Control Hearing*, *supra* note 25, at 25 (prepared statement of Harry Wu) ("A newly-married couple is given one quota, or permission to bear one child. Upon the birth of their first child, endless 'precautions' begin to prevent a second birth. If their first child is female, they may have a second child with permission from authorities. . . . Unconditional sterilization follows to rule out further births.").

Marriage restrictions are intimately tied to the population control program.²⁸ National law prevents men under the age of twenty-two and women under the age of twenty from legally marrying.²⁹ The Marriage Law has serious implications for young couples: The one-child policy forbids unmarried couples (or single women) from having any children, but the Marriage Law would also prevent them from marrying to legitimize the pregnancy.³⁰ Therefore, an unmarried man and woman under the ages of twenty-two and twenty, respectively, who conceive a child, automatically violate the one-child policy, resulting in forced abortion.

The government implemented the one-child policy in 1979, but it did not officially codify the ban until 2001.³¹ For over twenty years, the only positive law related to the one-child policy derived from general declarations in the 1980 Marriage Law—which states that both husband and wife have a legal duty to practice family planning³²—and in the 1982 Constitution—which includes an affirmative duty to follow family planning procedures.³³ In 2001, the government formalized the one-child policy by passing the Law of the People's Republic of China on Population and

28. Some courts and commentators view marriage and birth restrictions as distinct; taken at face value, minimum age requirements for marriage are legitimate and internationally accepted. *See, e.g.,* *Chen v. Ashcroft*, 381 F.3d 221, 230 (3d Cir. 2004) (pointing out that every state sets minimum age requirements, and even though China's minimum ages are higher than those in the United States, "we cannot go so far as to say that enforcement of these [marriage] laws necessarily amounts to persecution"). However, China enacted a national marriage age specifically to prevent couples from reproducing early in life; thus, the biological window for reproduction shortens, and couples reproduce less often. When viewed in context, China's Marriage Law is an integral part of its overall coercive population control program. *See Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (holding that China's Marriage Law plays an important role in population control); *Li v. Ashcroft*, 356 F.3d 1153, 1159 n.5 (9th Cir. 2004) (same).

29. Marriage Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Jan. 1, 1981), art. 5, *translated in* *Law in the People's Republic of China: Commentary, Readings and Materials* 380, 380 (Ralph H. Folsom & John H. Minan eds., 1989) (P.R.C.) [hereinafter *Marriage Law*]. These are minimum age requirements; localities can set higher limits. *See, e.g., infra* note 111 (describing a case where the petitioner claimed that his locality required men to be twenty-five and women twenty-three in order to legally marry).

30. *Forced Abortion and Sterilization in China: The View From the Inside: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 105th Cong. 7 (1998) [hereinafter *Forced Abortion Hearing*] (statement of Nicole Hess, Laogai Research Found.); *see* Jiali Li, *China's One Child Policy: How and How Well Has It Worked? A Case Study of Hebei Province, 1979-88*, 21 *Population & Dev. Rev.* 563, 564 (1995) (stating that both illegally married couples and unwed couples are punished if they conceive).

31. Before codification, the law governing family planning existed "as an amalgam of constitutional duties, regulations of the Ministry of Health, state policies, [Communist] Party policies, Party enactments, provincial policies, provincial administrative regulations, and local supplementary regulations." Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, in *Law in the People's Republic of China: Commentary, Readings and Materials*, *supra* note 29, at 408, 408.

32. Marriage Law, *supra* note 29, art. 12.

33. Xian fa [Constitution] art. 49 (1982) (P.R.C.), *translated in* *Law in the People's Republic of China: Commentary, Readings and Materials*, *supra* note 29, at 945, 954.

Family Planning.³⁴ Since 2001, the Chinese government has legally propagated a comprehensive population control policy which includes provisions to prevent young marriages,³⁵ out-of-wedlock births,³⁶ and multiple births. In the years since its inception, China's family size restrictions have proved extremely effective.³⁷

B. *Non-Coercive and Coercive Enforcement of the One-Child Policy*

The Chinese government employs a variety of tools to enforce the one-child policy, including propaganda, incentives, disincentives, and coercion. Although the national government created the one-child policy, the Family Planning Law delegates responsibility for implementation to local authorities.³⁸ Many localities set birth quotas and work diligently to ensure they meet targets;³⁹ the pressure to meet these quotas underscores the

34. Law on Population and Family Planning (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2001, effective Sept. 1, 2002), *translated* in LexisNexis, Chinalawinfo Selected PRC Laws [hereinafter Family Planning Law]. The national law delegates responsibility for implementation of family planning objectives to local governments. *Id.* art. 10.

35. See *supra* note 28 and accompanying text (linking the Marriage Law with China's population control policy).

36. See Luo Lin et al., *Induced Abortion Among Unmarried Women in Sichuan Province, China*, 51 *Contraception* 59, 61 (1995) ("[T]he primary reason why unmarried women undergo induced abortions is simply because they are unmarried, and premarital fertility is still considered unacceptable.").

37. See *infra* Part I.B for further discussion of enforcement techniques used to ensure compliance with the one-child policy. Chinese officials credit the one-child policy with preventing over 400 million births. *China's Family Planning Policy Prevents 400 Million Births*, Xinhua Gen. News Service, Nov. 9, 2006, available at http://news3.xinhuanet.com/english/2006-11/09/content_5309779.htm. However, the one-child policy has had unintended results. Due to a cultural preference for male heirs, couples who can only have one child often take desperate measures to ensure that it is a boy. The Family Planning Law banned the use of ultrasound technology to discover the sex of a fetus so that women would not abort otherwise healthy and legal girls. Family Planning Law, *supra* note 34, art. 35. Nonetheless, reports of female infanticide are not uncommon. See Amy Hampton, Comment, *Population Control in China: Sacrificing Human Rights for the Greater Good?*, 11 *Tulsa J. Comp. & Int'l L.* 321, 340-41 (2003) (summarizing the rise of infanticide practices after the adoption of the one-child policy). Consequently, China's sex ratio is heavily skewed towards men. See John Pomfret, *In China's Countryside, 'It's a Boy!' Too Often*, Wash. Post, May 29, 2001, at A1.

38. Family Planning Law, *supra* note 34, art. 10. For example, Beijing municipality passed a law providing for local mass media broadcasting of family planning propaganda, sex education in schools, setting target population levels in the city, family planning medical facilities, dissemination of free contraceptives, economic rewards for compliance, and punishments for violation of the one-child policy. Beijing Family Planning Law, *supra* note 22, arts. 8-12, 20-21, 29, 31, 38-43.

39. Thomas L. Hunker, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 *J. Transnat'l L. & Pol'y* 131, 134 (2005) (noting that 1900 of China's 2800 counties set birth control targets and quotas); Li, *supra* note 30, at 563 (describing the top-down process of setting national population goals, delegating local officials to set birth quotas, and doling out birth allowances among couples wishing to conceive legally).

necessity of effective enforcement.⁴⁰ However, because local authorities set quotas, enforcement of the one-child policy varies among regions, particularly between urban and rural areas.⁴¹ Despite these variances, enforcement of the one-child policy generally includes a first-line attempt to encourage families to have fewer children, followed by more severe efforts if illegal pregnancies persist. This section first addresses non-coercive, mainly economic enforcement methods, then contrasts the use of physical force and coercion to ensure compliance with the one-child policy.

1. Conditioning Economic Benefits on Conformity with Family Planning Directives

The Chinese government attempts to encourage single child families using economic pressure and rewards. Elisabeth Croll characterized this as a scheme "to encourage a preference for one child only [by] reduc[ing] the cost of [the] first child and dramatically increas[ing] the cost of subsequent children."⁴² Couples who agree to have one child qualify for a certificate that entitles them to subsidized medical care and education for the child,⁴³ better housing or farmland plots, and cash rewards.⁴⁴ Thus, incentives aim to prevent out-of-plan pregnancies before women even conceive.

On the other hand, couples who forego incentives to have an unauthorized child bear heavy economic costs. They must pay fines to compensate the state for the burden imposed by any extra children.⁴⁵ Whereas single child families receive medical care and education, a family who violates the one-child policy is responsible for all these expenses for

40. See Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 Hous. J. Int'l L. 557, 568-69 (1996) (noting that the pressure to meet population growth goals can result in abuses of enforcement power).

41. For example, rural officials may grant exceptions to the one-child policy for families who need more children, preferably male, to work on farmland. Conversely, the government monitors childbirths more carefully in densely populated urban areas. See Croll, *supra* note 21, at 28; Erin Bergeson Hull, Note, *When Is the Unmarried Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a "Spouse" for the Purpose of Asylum Eligibility? The Diverging Opinions of Ma v. Ashcroft and Chen v. Ashcroft*, 2005 Utah L. Rev. 1021, 1024 (summarizing the different levels of enforcement among urban and rural areas).

42. Croll, *supra* note 21, at 29.

43. See Beijing Family Planning Law, *supra* note 22, at art. 21(3) (specifying that the husband's and/or wife's employer must cover medical and educational costs for the one-child certified family).

44. The Beijing Family Planning Law provides that each certified one-child family will receive a ten renminbi (RMB) cash award for every month from the time of certification until the child turns eighteen. *Id.* art. 21(1).

45. Croll, *supra* note 21, at 30 (noting that employers can deduct five to ten percent of an offending couple's income per year for up to sixteen years after the birth of a second child); see *Human Rights Hearing*, *supra* note 4, at 23 (prepared statement of Hon. Arthur E. Dewey, Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Dep't of State) (describing the large fees and penalties associated with one-child policy violations as "tantamount to coercion"); Skalla, *supra* note 18, at 338-39 (describing fine structures in various provinces).

the unlawful child.⁴⁶ The family also forfeits housing and cash benefits bestowed on single-child certified families; furthermore, if a certified family breaks its promise to have only one child, it must repay the value of the rewards received for the first child.⁴⁷ Economic incentives and the corresponding penalties are powerful motivators for couples to voluntarily respect family size mandates.

2. Intimidation and Physical Force to Limit Family Size

Officials employ a variety of techniques ranging from propaganda and social pressure to physical force to "convince" women to terminate out-of-plan pregnancies. Despite the government's position that compliance with the one-child policy is voluntary,⁴⁸ in many cases enforcement morphs from economic incentives⁴⁹ to outright coercion:⁵⁰

"There are cases in China where brute force is used to perform abortion and sterilization. But more commonly, the Chinese government abides by its own Orwellian definition of voluntary, which is to say that you can fine the woman; you can lock her up; you can subject her to morning-to-night brainwashing sessions; you can cut off the electricity to her house; you can fire her from her job All of this psychological mauling, sleep deprivation, arrest, and grueling mistreatment is inflicted upon these women in order to break their will to resist. But as long as the pregnant women walk the last few steps to the local medical clinic under their own power, then the abortions that follow are said by the government to be 'voluntary.'"⁵¹

Family planning officials may use advertising campaigns to promote sustainable population growth by encouraging citizens to subjugate their own desires for children to the needs of their country.⁵² Local officials

46. Croll, *supra* note 21, at 30.

47. *Id.*

48. Zhang, *supra* note 40, at 570 ("[T]he central authorities denounce coercion and announce that the family planning policy is voluntary but require that population targets . . . continue to be met."). The ideal of families freely deciding to limit themselves to one child for the good of their country is inconsistent with the penalties provided in local law and the wide latitude officials have to enforce the policy.

49. Officials may use noncoercive enforcement tools to manipulate families to comply with one-child mandates. For example, propaganda campaigns paint the one-child certificate as a badge of honor, creating a powerful social stigma around multiple-child families. See Hampton, *supra* note 37, at 334 (stating that couples who violate the one-child policy "are maligned as irresponsible free-riders in the eyes of the public" (quoting James Z. Lee & Wang Feng, *One Quarter of Humanity: Malthusian Mythology and Chinese Realities, 1700-2000*, at 134 (1999))).

50. The Chinese government denies the use of coercion in enforcing the one-child policy. See White Paper, *supra* note 15, pts. III, VII (affirming that compliance with the one-child policy is voluntary and that the family planning laws comply with international human rights standards).

51. Scott Weinberg, *An End to the One-Child Quota?*, Catholic World Rep., Feb. 2000, at 44 (quoting Steven Mosher, Population Research Inst., Address at Conference on Human Rights in China (1999)).

52. See Zhang, *supra* note 40, at 563-64; see also Hunker, *supra* note 39, at 134 ("Propaganda campaigns describe the choice to abort or to become sterilized as honorable in

employ more targeted social pressure to intimidate and humiliate women; for example, authorities publicly monitor their menstrual periods, visit their homes, and force them to attend mandatory family planning study sessions.⁵³ This pressure can effectively shame women into reporting to a clinic for an abortion.

If social pressure fails, there have been numerous cases of documented, even if unauthorized, uses of physical force to coerce women into abiding by the one-child policy. A network of informants spy on women of childbearing age and report unauthorized pregnancies to family planning officials.⁵⁴ Officials in Tianjin municipality then employ a strategy known as "killing the chicken to scare the monkey," whereby they raze the home of a family who violates the one-child policy and bring all of the women of childbearing age in the area to watch.⁵⁵ Physical force extends beyond property damage and arrest to mandatory abortion. One victim testified that local officials ordered her to abort her second child when she was six-and-a-half-months pregnant; when she refused, they threatened to fire her from her job, levy a substantial fine, and deny the unborn child a residence permit.⁵⁶ When she again refused and begged to keep her child, officials accosted her at her home and brought her to an abortion clinic.⁵⁷ There, nurses restrained her while they injected a drug through her abdomen into the fetus, killing it; they then delivered the dead fetus by physically pushing against the mother's stomach to move the body through the birth canal.⁵⁸ Countless families have thus come to comply with the one-child policy. The complex system of incentives and punishment successfully prevents couples from having more than one child.

C. U.S. Asylum Legislation in Response to China's One-Child Policy

In light of mounting opposition to Chinese human rights abuses, U.S. policymakers reversed the country's closed-door policy by creating legal

order to create psychological pressure for those contemplating the decision to have another child [to reconsider]."). These campaigns are reminiscent of the 1970s "wan, xi, shao" (later, longer, fewer) propaganda aimed at promoting later marriages, spacing between births, and fewer children. See Zhang, *supra* note 40, at 561.

53. See *Coercive Population Control Hearing*, *supra* note 25, at 16 (statement of Steven W. Mosher, Population Research Inst.); *Forced Abortion Hearing*, *supra* note 30, at 2 (statement of Rep. Christopher Smith, Chairman, House Comm. on Int'l Relations) (discussing the intense psychological pressure employers, family, and friends place on women in violation of the one-child policy to convince them to abort the unauthorized fetus); Li, *supra* note 19, at 154; Beech, *supra* note 1, at 61 (chronicling punishments such as fines, beatings, and study sessions in Linyi, China).

54. See *Forced Abortion Hearing*, *supra* note 30, at 3 (statement of Rep. Christopher Smith, Chairman, House Comm. on Int'l Relations) (testifying that local Chinese officials use a network of paid informants who report unauthorized pregnancies of neighbors, relatives, and friends).

55. *Coercive Population Control Hearing*, *supra* note 25, at 25 (prepared statement of Harry Wu).

56. *Id.* at 27 (statement of Mahire Omerjan).

57. *Id.* at 28.

58. *Id.*

asylum protection for victims of the one-child policy. This section outlines the political struggle to form specific immigration legislation covering Chinese nationals fleeing coercive population control.

In May 1989, the BIA had issued a decision effectively closing U.S. borders to Chinese refugees fleeing the one-child policy. In *In re Chang*,⁵⁹ the BIA denied asylum to an applicant fleeing China's population control measures. The BIA stated outright, "We do not find that the 'one couple, one child' policy of the Chinese government is on its face persecutive."⁶⁰ Instead, the BIA required an asylum applicant to establish that the Chinese government had selectively applied its coercive population control policy to the applicant because he or she belonged to a particular religion or minority group, or expressed unpopular political opinion.⁶¹ However, mere weeks after the BIA's decision in *Chang*, the Chinese government sent army tanks to quell unarmed students and intellectuals protesting against the Communist Party in Tiananmen Square; in twenty-four hours soldiers killed anywhere from 1000 to 5000 civilians in what is universally recognized as a bloody massacre.⁶² This event only magnified the disregard of human rights under China's coercive population control regime. In response, U.S. policymakers wanted to take official action to express American disapproval of human rights abuses in China.⁶³ They chose to counter China's human rights violations by reconsidering U.S. immigration policy.⁶⁴ The turmoil of June 1989 thus ignited a seven year struggle in Congress to override *Chang* and provide comprehensive legal protection for the victims of the Chinese government's human rights abuses.⁶⁵

Congress and the Executive branch made several attempts to legally protect victims of China's one-child policy. The House of Representatives and the Senate passed the Armstrong-DeConcini Amendment to the Emergency Chinese Immigration Relief Act of 1989 in order to overrule *In re Chang*'s determination that the one-child policy was not a program of

59. 20 I. & N. Dec. 38 (B.I.A. 1989).

60. *Id.* at 43.

61. *Id.* at 44. Under *Chang*, an applicant could only show that he or she had been persecuted by demonstrating that the government had threatened to punish him or her *in particular* for violating the one-child policy. *Id.*

62. David Aikman, *The Battle of Beijing, in Tiananmen: China's Struggle for Democracy: Its Prelude, Development, Aftermath, and Impact* 81, 118-19 (Winston L. Y. Yang & Marsha L. Wagner eds., 1990).

63. In 1995, the House of Representatives clarified its thought process in ultimately deciding to protect Chinese nationals by amending U.S. immigration law:

The Committee believes that . . . policies of coercive family planning are "laws of general application" motivated by concerns over population growth [and are persecutory]. The BIA opinion [in *Chang*] effectively precludes from protection persons who have been submitted to undeniable and grotesque violations of fundamental human rights. . . .

The United States should not deny protection to persons subjected to such treatment.

H.R. Rep. No. 104-469(1), at 174 (1996).

64. *See id.*

65. Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 Geo. Immigr. L.J. 881, 886 (2000).

persecution.⁶⁶ However, President George H. W. Bush vetoed the Act in favor of executive action he claimed would achieve Congress's goals while allowing him to manage foreign relations with China.⁶⁷ He directed Attorney General Richard Thornburgh to give enhanced consideration to refugees who express a fear of persecution due to coercive population control measures including forced abortion and sterilization.⁶⁸ As Professor Paula Abrams dryly observed, "For the next three years, the Executive embarked on a series of bungled attempts to provide this 'enhanced consideration.'"⁶⁹ The Attorney General issued an interim rule providing that refugees fleeing their home country to avoid forced abortion or sterilization can establish political persecution;⁷⁰ President Bush's Executive Order No. 12,711⁷¹ incorporated this rule.⁷² Despite these gestures, the final published rule made no mention of asylum for refugees fleeing coercive population control.⁷³ Therefore, on the last day of George H. W. Bush's Administration, Attorney General William Barr signed another final rule explicitly designating victims of the one-child policy as deserving of refugee status.⁷⁴ The incoming Administration of President William Jefferson Clinton prevented the second final rule from being published.⁷⁵ Uncertain as to the precedential value of *In re Chang* after this executive branch back-and-forth, the BIA certified its decision for review by Attorney General Janet Reno; she declined to offer guidance.⁷⁶ At this point, the U.S. government's stance on the level of security to offer Chinese

66. See 135 Cong. Rec. S8160, 8241 (daily ed. July 19, 1989) (proposing an amendment to the Immigration and Naturalization Act, due to the severe consequences associated with the Chinese government's unrelenting population control policy, so that "all adjudicators of asylum or refugee status shall give fullest possible consideration to applications from nationals of the People's Republic of China who express a fear of persecution . . . because they refuse to abort a pregnancy or resist sterilization in violation of Chinese Communist Party directives on population"); see also Abrams, *supra* note 65, at 886.

67. Memorandum of Disapproval for the Bill Providing Emergency Chinese Immigration Relief, 2 Pub. Papers 1611 (Nov. 30, 1989).

68. President George H. W. Bush noted that he "deplore[d] the violence and repression employed in the Tiananmen events," but that executive action would similarly achieve Congress's "laudable objectives" in proposing the Emergency Chinese Immigration Relief Act. *Id.* at 1612; see Abrams, *supra* note 65, at 886.

69. Abrams, *supra* note 65, at 886.

70. Refugee Status, Withholding of Deportation, and Asylum; Burden of Proof, 55 Fed. Reg. 2803 (Jan. 29, 1990).

71. Policy Implementation With Respect to Nationals of the People's Republic of China, Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 13, 1990).

72. See Hunker, *supra* note 39, at 140.

73. See Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30,674 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253); Hunker, *supra* note 39, at 140.

74. See Abrams, *supra* note 65, at 886.

75. See Hunker, *supra* note 39, at 140; see also Regulatory Review, 58 Fed. Reg. 6074 (Jan. 25, 1993) (requesting that President Clinton's appointees approve all new regulations before they are published).

76. See Abrams, *supra* note 65, at 887.

nationals persecuted under a coercive population control regime seemed unclear.⁷⁷

Finally, in 1996 Congress took definitive action to protect Chinese nationals by passing section 601 of the Illegal Immigration Reform and Immigrant Responsibility Act.⁷⁸ This statute aimed to provide definitive protection for refugees persecuted by coercive family planning policies.⁷⁹

D. *The IIRIRA and a New Definition of "Refugee"*

This section presents the IIRIRA's definition of refugee, which Congress broadened to include victims of the one-child policy. Generally, to qualify for asylum, an alien applicant must show that he or she is a refugee under the Immigration and Naturalization Act.⁸⁰ Section 601 of the IIRIRA amended this definition to specifically address the question of one-child policy refugees:⁸¹

[A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.⁸²

The IIRIRA originally capped the number of refugees granted asylum on grounds of persecution by coercive population control to 1000 per year.⁸³ However, the Real ID Act of 2005 abolished this limitation.⁸⁴ Now, there is no specific cap on the number of Chinese refugees fleeing the one-child policy that can obtain asylum in the United States under section 601 of the IIRIRA.⁸⁵ In passing the IIRIRA, the U.S. government gave heightened consideration for victims of China's coercive population control policies.

77. In many cases, the BIA continued to apply *Chang* to Chinese nationals claiming persecution under the one-child policy. See, e.g., *In re G-*, 20 I. & N. Dec. 764 (B.I.A. 1993).

78. Pub. L. No. 104-208, § 601(a)(1), 110 Stat. 3009-689 (codified as amended at 8 U.S.C. § 1101(a)(42)(B) (2000)).

79. See Abrams, *supra* note 65, at 884.

80. See *supra* note 8 for the statutory definition of a refugee.

81. Congress's expansion of the refugee designation in effect overruled the BIA's holding in *In re Chang*. See Abrams, *supra* note 65, at 885.

82. IIRIRA § 601(a)(1).

83. *Id.* § 601(b).

84. Real ID Act of 2005, Pub. L. No. 109-13, div. B, tit. I, § 101(g)(2), 119 Stat. 231 (codified at 8 U.S.C. § 1157(a)(5) (2000)).

85. In 2003, about 14,000 Chinese refugees applied for asylum; approximately 7000 of those refugees based their application on persecution due to China's coercive population control measures. Michelle Chen, *Leaving One-Child Behind: Chinese Immigrants Seek Asylum in America from China's One-Child Policy*, Legal Aff., Nov.-Dec. 2005, at 8, 9, available at http://www.legalaffairs.org/issues/November-December-2005/scene_chen_novdec05.msp.

E. Derivative Asylum Rights for the Spouses of Chinese Nationals Persecuted by the One-Child Policy: The Case of In re C-Y-Z-

The BIA's interpretation of the IIRIRA further expanded asylum rights for Chinese nationals fleeing coercive population control. The BIA addressed the question of extending asylum to a Chinese national who had not personally suffered a forced abortion or sterilization as a consequence of violating the one-child policy in *In re C-Y-Z*.⁸⁶ This section presents the facts and procedural history of the landmark case, the BIA's opinion, and potential rationales in support of the BIA's finding.

In *In re C-Y-Z*-, the petitioner and his wife twice violated Chinese restrictions on family size. The couple had a traditional marriage in 1986.⁸⁷ After the birth of their first daughter, local officials forced the applicant's wife to wear an IUD to prevent the birth of more children.⁸⁸ The applicant protested against the IUD, for which he was arrested.⁸⁹ Eventually, his wife illegally removed her IUD, and the couple became pregnant with a second daughter;⁹⁰ local officials fined them for this birth.⁹¹ The applicant's wife subsequently conceived again, giving birth to a son while hiding in the countryside.⁹² Upon learning that the couple again ignored the one-child policy, local officials came to the applicant's house in the middle of the night and escorted his wife to a clinic where she was forcibly sterilized.⁹³ Eighteen months later, the applicant left China and requested asylum in the United States.⁹⁴

In support of his asylum application, the candidate produced unauthenticated copies of his marriage certificate, birth certificates for his three children, a document certifying his fine for having the second child, and a document stating that his wife underwent sterilization after the birth of their third child.⁹⁵ The immigration judge did not make an adverse credibility finding regarding the applicant's testimony or documentary

86. 21 I. & N. Dec. 915 (B.I.A. 1997).

87. *Id.* Although the BIA did not comment on the matter, note that the applicant and his wife did not register their marriage until 1991—around the time of the birth of their third child—and thus they were not legally married during much of the time they were persecuted. *Id.* at 915 n.2.

88. *Id.* at 916.

89. *Id.*

90. *Id.* at 932 (Vacca, Board Member, dissenting).

91. *Id.* at 916. Officials ordered the applicant's wife to abort their second child, but she hid with relatives in order to carry the pregnancy to term. *Id.* When she emerged from hiding with the second child, officials fined them 2000 RMB, or the equivalent of three month's salary, which the applicant paid so that birth control cadres would not destroy his house. *Id.*

92. The applicant testified that he knew they had violated the one-child policy, but they were willing to take their chances to have a son. *Id.* This reflects a common preference among Chinese citizens for male progeny. See *supra* note 37 regarding the consequences of gender preference in light of one-child restrictions.

93. *In re C-Y-Z*-, 21 I. & N. at 930.

94. *Id.* at 916. The applicant's wife and three children remained in China, a fact the immigration judge weighed heavily against him. See *id.*

95. *Id.*

evidence.⁹⁶ Instead, the immigration judge denied his application because the Chinese government did not persecute the applicant directly.⁹⁷ The judge expressed an unwillingness to allow the applicant to “ride on his wife’s coattails or claim asylum because of alleged adverse factors to his wife, including forced sterilization . . . [when] [h]e, himself, has never been persecuted.”⁹⁸

The applicant appealed his denial of asylum to the BIA.⁹⁹ Relying heavily on a Memorandum from the Office of the General Counsel of the Immigration and Naturalization Service, the BIA agreed that “the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him.”¹⁰⁰ Therefore, the BIA overturned the immigration judge’s decision, holding that persecution of one spouse can be established on the basis of forced abortion or sterilization¹⁰¹ suffered by the

96. The judge specifically “put[] aside any questions [he] might have as to whether the applicant has been completely truthful . . . whether he has embellished or puffed the story to make it seem more than it is.” *Id.* The immigration judge is in the best position to make credibility determinations, but the BIA may decide that evidence accepted by the immigration judge is, in fact, legally insufficient. *See Canjura-Flores v. INS*, 784 F.2d 885, 888-89 (9th Cir. 1985). If neither the immigration judge nor the BIA makes an adverse credibility finding, courts have traditionally presumed the applicant to be credible. *Id.*; *see Leiva-Montalvo v. INS*, 173 F.3d 749, 750-51 (9th Cir. 1999) (refusing to remand an El Salvadorian refugee’s case to the BIA to determine the credibility of his testimony when both the immigration judge and the BIA failed to do so originally). However, the Real ID Act of 2005 restricted courts’ discretion so that if there is no credibility determination, the applicant is entitled only to a rebuttable presumption of credibility. Real ID Act of 2005 § 101(a)(3)(iii), 8 U.S.C. § 1158(b)(1)(B) (2000). This Act codified much of the case law concerning credibility determinations and the burden of proof. Currently, an asylum applicant may establish a well-founded fear of persecution by his or her testimony alone if that testimony provides consistent, specific, and credible details; evidence corroborating his or her story, or an explanation for its absence, may be required where it would reasonably be expected. *Id.* at § 101(a)(3)(ii). The judge should base an adverse credibility finding on any “inconsistent statements, contradictory evidence, and inherently improbable testimony”—even if these inconsistencies do not go to the heart of the asylum claim; but, “failure of proof is not a proper ground per se for an adverse credibility determination.” *In re S-M-J*, 21 I. & N. Dec. 722, 731 (1997); *see* Real ID Act of 2005 § 101(a)(3)(iii). To support a finding that the applicant failed to meet his or her burden of proof, the BIA must: (1) explicitly rule on the applicant’s credibility; (2) explain why they reasonably expect corroborating evidence to support the applicant’s testimony; and (3) evaluate the sufficiency of the applicant’s explanation for why he or she cannot produce corroborating evidence. *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000); *cf. Cordon-Garcia v. INS*, 204 F.3d 985, 993 (9th Cir. 2000) (holding that corroborating evidence is unnecessary if the asylum applicant provides credible testimony).

97. The BIA did not consider his brief arrest for protesting against his wife’s intrauterine device (IUD). *In re C-Y-Z*, 21 I. & N. at 916.

98. *Id.*

99. During the pendency of his appeal, Congress passed section 601 of the IIRIRA. *Id.* at 917.

100. *Id.* at 918.

101. This Note uses gender neutral language. Although no cases to date have addressed the problem of asylum rights for women based on the forcible sterilization of their husbands or partners, that scenario is theoretically possible. All of the cases discussed in this Note, however, concern men applying for asylum based on a woman’s forced abortion or sterilization.

other spouse.¹⁰² The applicant in *In re C-Y-Z-* won asylum due to his wife's forced sterilization.¹⁰³

Unfortunately for circuit courts, the BIA's opinion did not expressly explain the rationale for imputing persecution from one spouse to another.¹⁰⁴ However, then-Circuit Judge Samuel Alito posited two explanations. First, it may be that witnessing the forced abortion or sterilization of a spouse causes the other spouse to "experience intense sympathetic suffering that rises to the level of persecution."¹⁰⁵ Or, the BIA may have reasoned that a forced sterilization or abortion directly impacts the other spouse's rights to procreate and raise children and thus constitutes persecution.¹⁰⁶ The BIA's exact rationale may not be determinative since circuit courts ultimately decide whether the BIA's interpretation of the IIRIRA should govern future asylum seekers. Nonetheless, the BIA's vagueness has made the circuit courts' decisions whether or not to defer to *In re C-Y-Z-* more difficult; one court simply refused to address the matter without more substantive reasoning from the BIA.¹⁰⁷ The BIA finally

102. *In re C-Y-Z-*, 21 I. & N. at 919.

103. Although the BIA granted petitioner's request for asylum, this case provoked a series of concurring and dissenting opinions demonstrating the Board's fragmented view. One Board Member wrote separately to support the legitimacy of imputed political opinion. *Id.* at 922 (Rosenberg, Board Member, concurring). Another argued that the infliction of a forced abortion or sterilization on one spouse should only imply that the other spouse has been persecuted when "a couple . . . jointly want[ed] more children and oppose[d] their government's efforts to restrict family size. In these circumstances, the sterilization of one spouse adversely affects both." *Id.* at 928-29 (Filppu, Board Member, concurring in part). If the husband is satisfied with the size of his family and does not oppose the one-child policy, then he should not gain asylum based on his wife's persecution, even if his wife adamantly opposes the coercive population control program. *Id.* at 929. Dissenting members opposed imputing persecution from one spouse to another. *Id.* at 933 (Vacca, Board Member, dissenting). "[I]mputed past persecution' based on the past persecution of the applicant's wife defies the rules of statutory construction If Congress had desired to include spouses of individuals who had been forced to undergo involuntary abortion or sterilization procedures, they would have done so expressly in the [IIRIRA]." *Id.*

104. Some time after issuing the decision, the Commissioner of the Immigration and Naturalization Service certified *In re C-Y-Z-* for review by the Attorney General, but in 2004, John Ashcroft refused to offer guidance. *In re C-Y-Z-*, 23 I. & N. Dec. 693 (A.G. 2004). In spite of this and numerous other requests for clarification, the BIA remained silent on its justification for the *In re C-Y-Z-* decision for almost ten years. See *Lin v. U.S. Dep't of Justice*, 416 F.3d 184 (2d Cir. 2005) (remanding a series of cases in an attempt to force the BIA to shed light on its rationale for imputed persecution for married spouses); see also Hull, *supra* note 41, at 1044-45 (arguing that circuit courts would continue to grapple with the "unspecific and inconsistently applied holding of *In re C-Y-Z-*" until the BIA fully explains its position). But see *infra* Part II.C (discussing the BIA's reaffirmation of *In re C-Y-Z-*).

105. *Chen v. Ashcroft*, 381 F.3d 221, 225 (3d Cir. 2004).

106. *Id.* at 226. Although the courts lament the obscurity of *In re C-Y-Z-*'s rationale, in other contexts they have been willing to accept the concept of imputed persecution. For example, in *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004), the U.S. Court of Appeals for the Sixth Circuit granted asylum to an Ethiopian woman based on the possibility that her daughter would suffer female genital mutilation if they returned to their home country. There, just as in *In re C-Y-Z-*, the applicant herself was unharmed, but she won asylum based on another's persecution.

107. *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 192 (2d Cir. 2005); see *infra* Part II.B.2.

issued a decision elucidating its resolution to deny derivative asylum to unmarried Chinese nationals in 2006.¹⁰⁸ It remains to be seen whether this more detailed explanation can persuade future circuit courts to sustain marital status distinctions in one-child policy cases.

The *In re C-Y-Z-* decision has had a tremendous impact on the rights of Chinese refugees applying for asylum in the United States. Although the language of *In re C-Y-Z-* does not explicitly deny imputed asylum rights to unmarried partners, since 1997 the BIA has never granted asylum to one-child policy refugees who were not legally married in China.¹⁰⁹ The controversial decision in *In re C-Y-Z-* influences circuit courts as they consider appeals from refugees denied asylum under that precedent.

II. U.S. ASYLUM LAW AND THE FATE OF UNMARRIED CHINESE APPLICANTS

Section 601 of the IIRIRA extends asylum rights to Chinese refugees who have been personally persecuted by China's one-child policy. The BIA's decision to grant asylum to a refugee based on his spouse's forced abortion created asylum rights for Chinese refugees who were not themselves victims of the one-child policy; this decision guides U.S. circuit courts as they consider asylum rights for the unmarried partners of Chinese refugees. This part traces various interpretations of the BIA's decision *In re C-Y-Z-* through a series of circuit court cases. Part II.A begins by analyzing opinions from the majority of circuits, which traditionally have refused to impute persecution among unmarried couples in accordance with the BIA's administrative interpretation of the IIRIRA. Part II.B then contrasts the majority's deferential decisions with two circuit court decisions in which the courts did not align themselves with the BIA's decision in *In re C-Y-Z-*. Finally, Part II.C examines the BIA's recent, long-delayed reconsideration of *In re C-Y-Z-*.

A. *The Majority: No Derivative Asylum Rights for Unmarried Chinese Applicants in Deference to the BIA's Interpretation of the IIRIRA*

The majority of circuit courts have denied asylum appeals from unmarried Chinese applicants seeking refuge in the United States based on their partners' forced abortions or sterilizations, interpreting *In re C-Y-Z-* to apply strictly to married spouses. This section presents cases from the U.S. Courts of Appeals for the Third, Fifth, and Seventh Circuits denying asylum to unmarried Chinese applicants. All of the couples discussed herein were too young to legally marry when they conceived and suffered forced abortions. Although the courts refer to these couples using varied

108. *In re S-L-L-*, 24 I. & N. Dec. 1, 8 (B.I.A. 2006) (explaining the unique position of married couples vis-à-vis persecution when one spouse suffers forced abortion or sterilization); see *infra* Part II.C.

109. *Chen v. Gonzales*, 152 F. App'x 528, 530 (7th Cir. 2005) (denying asylum to an unmarried refugee based on his girlfriend's forced abortion because the "BIA has never extended the *C-Y-Z-* rule to unmarried couples").

titles such as "fiancé/fiancée," "boyfriend/girlfriend," and "partner," all of the couples herein expressed at least a desire to marry, if not an actual attempt. Regardless of their intent, however, most courts have refused to impute the persecution of one partner to another applying for asylum in the United States in the absence of a legal marriage.

1. The Third Circuit in *Chen v. Ashcroft*

In *Chen v. Ashcroft*¹¹⁰ the Third Circuit deferred to the BIA's interpretation of *In re C-Y-Z-* in refusing the petitioner's asylum application. There, Cai Luan Chen and his fiancée conceived a child before they reached the requisite age to legally marry in China.¹¹¹ When local officials discovered the underage, out-of-wedlock pregnancy, they ordered Chen's fiancée to undergo an abortion and threatened to arrest Chen if his fiancée did not report for the procedure.¹¹² Chen subsequently fled China and sought refuge in the United States.¹¹³ Although Chen's fiancée attempted to delay the sentence, local officials finally forced her to submit to an abortion in her eighth month of pregnancy.¹¹⁴

Upon arrival in the United States, Chen applied for asylum and asked that his fiancée's persecution be imputed to him under *In re C-Y-Z-*.¹¹⁵ Chen argued that had they met the age requirements, the two would have married, and consequently he would have been entitled to a presumption of persecution based on his fiancée's forced abortion.¹¹⁶ The immigration judge granted Chen's petition, even though Chen and his fiancée were not married, because his circumstances could be analogized to the facts of *In re C-Y-Z-*. He noted,

[I]n this particular case, at least, where [Mr. Chen] and his fiancée had been living together for some time and where they were not technically married only due to the fact that their right under international law to enter into a marriage was violated in that they were prohibited from

110. 381 F.3d 221.

111. *Id.* at 223. Cai Luan Chen was nineteen, and his fiancée was eighteen when she became pregnant. The 1980 Marriage Law specifies that women must be twenty and men must be twenty-two to marry legally. See *supra* note 29 and accompanying text. Chen claimed that his locality set minimum age requirements of twenty-five for men and twenty-three for women. *Chen*, 381 F.3d at 223. The couple would have had to wait six years to legally marry and conceive.

112. *Chen*, 381 F.3d at 223.

113. *Id.*

114. *Id.*

115. Brief for Petitioner-Appellant at 9, *Chen*, 381 F.3d 221 (No. 03-3124). Chen also argued that he himself was a victim of the one-child policy because the denial of his right to marry and the abortion of his child constituted past persecution. *Id.* The immigration judge agreed, noting "[i]t is hard to imagine anything more painful and horrific than to have one's child forcibly aborted by a . . . law which . . . clearly . . . [violates] . . . human rights." *Id.* at 8 (alteration in original).

116. *Id.* at 7-8. Chen submitted a document attesting that his fiancée had undergone an abortion as proof of his persecution. *Id.* at 7. Neither the immigration judge nor the BIA made an adverse credibility finding regarding the applicant's testimony or documentary evidence. *Id.* at 15 n.3.

registering their marriage under a Draconian law relating to marriage and birth control . . . *C-Y-Z-* does apply [T]hey would have been husband and wife and . . . the Court considers them to be husband and wife.¹¹⁷

Thus, the immigration judge extended the BIA's decision in *In re C-Y-Z-* to include couples like Chen and his fiancée who would have married but for the Marriage Law.

The BIA reversed this decision, asserting that *In re C-Y-Z-* limits grants of asylum to the married spouses of victims of coercive family planning.¹¹⁸ Then-Circuit Judge Alito confirmed the BIA's interpretation of the IIRIRA in accordance with the U.S. Supreme Court's decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*¹¹⁹ *Chevron* requires the courts to defer to agency interpretation of a statute when Congress has delegated general authority to the agency to administer that statute.¹²⁰ Once the court determined that Congress delegated authority to the BIA to administer and interpret immigration law,¹²¹ it applied *Chevron*'s two-step test to determine what level of deference to bestow on the BIA's decision that the IIRIRA does not apply to the unmarried partners of Chinese refugees forced to undergo sterilization or abortion.¹²²

In step one of the *Chevron* test, the court must determine whether Congress has unambiguously expressed its intent that the law be interpreted in a specific way; if so, that interpretation controls.¹²³ But, "[i]f Congress has explicitly left a gap for the agency to fill," the courts move to step two, a reasonableness test whereby agency interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."¹²⁴ Since Congress did not discuss marital status when expanding the definition of refugee under section 601 of the IIRIRA, the *Chen* court rested its denial of asylum on the finding that the BIA's interpretation of the IIRIRA in *In re C-Y-Z-* was not arbitrary or capricious.¹²⁵

The *Chen* court cited two rational basis justifications for the BIA's bright-line rule regarding marital status in one-child policy refugee cases:

117. *Id.* at 7-8.

118. *Chen*, 381 F.3d at 235.

119. 467 U.S. 837 (1984).

120. *Id.* at 842-43.

121. The court settled this issue quickly, stating that "there is no dispute that 'the BIA should be accorded *Chevron* deference for its interpretations of the immigration laws.'" *Chen*, 381 F.3d at 224 (quoting *Tineo v. Ashcroft*, 350 F.3d 382, 396 (3d Cir. 2003)).

122. *Id.* at 224.

123. *Id.*

124. *Chevron*, 467 U.S. at 843-44. The rationale for such deference is that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Chen*, 381 F.3d at 232 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

125. *Chen*, 381 F.3d at 227. Although Congress's intent in passing section 601 of the IIRIRA does not address the question of marital status, the Third Circuit inferred from the yearly cap on one-child policy refugees Congress's intent to provide a limited remedy. *Id.* at 232. Therefore, the court found that excluding unmarried Chinese refugees who were not directly persecuted was consistent with congressional goals. *Id.* at 234.

administrative convenience and fraud.¹²⁶ The Third Circuit posited that the BIA may have chosen marital status as a limiting factor because applicants can quickly and easily prove that they qualify by producing a marriage certificate.¹²⁷ Furthermore, requiring asylum seekers to be married spares the BIA from having to determine the closeness of the relationship between the applicant and the actual victim.¹²⁸ The Third Circuit found that the BIA could have rationally concluded that using marital status as a bright-line test in one-child policy cases promotes efficiency and avoids fraud.¹²⁹ Consequently, the Third Circuit awarded *Chevron* deference to the BIA's decision that *In re C-Y-Z-* applies only to married couples and denied Chen's petition for asylum based on his fiancée's forced abortion.

2. The Fifth Circuit in *Zhang v. Ashcroft*

In *Zhang v. Ashcroft*,¹³⁰ the Fifth Circuit denied an unmarried Chinese refugee's application for asylum premised on his girlfriend's forced abortion in accordance with a strict reading of *In re C-Y-Z-*. Here, the applicant and his girlfriend were living together when she became pregnant.¹³¹ After neighbors tipped off local officials to the out-of-wedlock pregnancy, they forced the girlfriend to undergo an abortion.¹³² Just before

126. *Id.* at 229. "[T]he statutory [marital status] distinction could be viewed as serving two purposes: (1) providing a convenient way to weed out cases in which 'close family ties' were lacking and (2) avoiding 'problems of proof and the potential for fraudulent visa applications.'" *Id.* at 228 (quoting *Fiallo v. Bell*, 430 U.S. 787, 798, 799 n.8 (1977) (upholding provisions that grant preferential immigration status to illegitimate children and their mothers but not their fathers)). For a more extensive discussion of these policy considerations, see *infra* Part III.B.

127. *Chen*, 381 F.3d at 228. This convenience of proof would allegedly ease the BIA's overcrowded docket and avoid questions of paternity/maternity. But consider that marriage certificates can be forged just as quickly and easily as they are legally produced. See *infra* Part III.B.

128. *Chen*, 381 F.3d at 229. A marriage certificate thus serves as a proxy for an individualized determination of the relationship between applicant and partner. See *id.* Such generalizations about marital relationships may have convinced the BIA that "*in general*, forced abortions and sterilization procedures tend to have a more severe impact on spouses than on unmarried partners." *Id.* at 228-29.

129. Compare Judge Samuel Alito's willingness to substitute his judgment for the BIA's with *Lin v. United States Department of Justice*, 416 F.3d 184, 192 (2d Cir. 2005). "The government suggests that we may simply supply our own rationale for the BIA's decision in *C-Y-Z-* and then act accordingly. But the U.S. Supreme Court has made clear that '[i]t will not do for a court to be compelled to guess at the theory underlying [a particular] agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.'" *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947)).

130. 395 F.3d 531 (5th Cir. 2004).

131. Brief of Petitioner-Appellant at 2, *Zhang v. Ashcroft*, 395 F.3d 531 (5th Cir. 2004) (No. 04-60183). Ru-Jian Zhang asserted that the couple wished to marry in China, but they did not meet the requisite age limits set by the Marriage Law. *Id.*; see also *supra* note 29 and accompanying text.

132. Brief of Petitioner-Appellant, *supra* note 131, at 2. Besides the abortion, Zhang's girlfriend was heavily fined for her illegal pregnancy; Zhang paid the fine. Brief for Respondent at 4, *Zhang*, 395 F.3d 531 (No. 04-60183).

her capture, Ru-Jian Zhang fled China and applied for asylum in the United States.¹³³

The immigration judge denied Zhang's application because he could not produce written proof that he fathered the aborted child.¹³⁴ The BIA affirmed the immigration judge's decision based on its precedent limiting *In re C-Y-Z-* to married couples. Because Zhang was "not legally married to [his girlfriend], nor did he register or attempt to register his marriage in accordance with legal requirements . . . [, nor did he] hold a traditional ceremony and public wedding in the presence of family and friends," the BIA found that "he was not married in any official or unofficial sense."¹³⁵ Consequently, the Board refused Zhang's request for asylum.

Zhang appealed the BIA's order to the Fifth Circuit. In its succinct opinion, the Fifth Circuit affirmed the decisions below.¹³⁶ The court incorporated by reference the Third Circuit's reasoning in *Chen*, granting *Chevron* deference to the BIA's decision to restrict asylum for Chinese nationals claiming persecution based on a partner's forced sterilization or abortion to married couples.¹³⁷ As Zhang and his girlfriend were not married, he could not gain entry into the United States based on her forced abortion.

3. The Seventh Circuit in *Chen v. Gonzales*

The Seventh Circuit declined to consider a Chinese applicant who could not register his marriage to be legally married as required by *In re C-Y-Z-*, and thus denied his asylum claim. The applicant in *Chen v. Gonzales*¹³⁸ attempted to marry his girlfriend in China, but the government denied them a marriage license because they were too young.¹³⁹ Five months later, his girlfriend became pregnant. One day while Zhi Zhi Chen was out, authorities came to the home where they lived and ordered her to appear at a clinic for an abortion.¹⁴⁰ An outraged Chen confronted his local family planning officials to protest the forced abortion; they called the police to report his conduct.¹⁴¹ After the incident at the clinic, Chen paid

133. Brief of Petitioner-Appellant, *supra* note 131, at 3.

134. *Id.* at 5. Although Zhang could not produce documentary evidence of paternity of an aborted child, the immigration judge found that his testimony regarding his relationship with his girlfriend was credible. Brief for Respondent, *supra* note 132, at 4. The BIA did not make a finding of credibility.

135. Brief for Respondent, *supra* note 132, at 5-6. Note the BIA's apparent willingness to recognize traditional, but illegal, marriage. *Cf. In re C-Y-Z-*, 21 I. & N. Dec. 915, 919 (B.I.A. 1997) (extending derivative asylum to the legal spouse of a Chinese national forcibly sterilized for violating the one-child policy).

136. *Zhang*, 395 F.3d at 532.

137. *Id.*

138. 152 F. App'x 528 (7th Cir. 2005).

139. *Id.* at 529.

140. *Id.*

141. *Id.* Zhi Zhi Chen testified that he tried to convince local authorities that he and his girlfriend were adults—he was twenty and his girlfriend was twenty-one when they conceived—entitled to have children. Brief for Petitioner-Appellant at 10-11, *Chen*, 152 F. App'x 528 (No. 04-1551). He became so upset that he hurled profanities at the family

snakeheads¹⁴² to smuggle him to the United States where he applied for asylum based on his girlfriend's abortion.¹⁴³

The immigration judge denied his petition, finding that Chen's testimony was not credible.¹⁴⁴ The judge characterized Chen's statements as "vague and implausible" because he did not provide corroborating documentary proof.¹⁴⁵ Instead, the judge would have required medical records or affidavits to confirm Chen's testimony regarding his girlfriend's abortion.¹⁴⁶ Additionally, the immigration judge noted that Chen was not entitled to an *In re C-Y-Z*-presumption of persecution because he and his girlfriend were not married when she suffered the forced abortion.¹⁴⁷ Chen appealed this decision to the BIA. The BIA summarily affirmed the immigration judge's decision, again refusing to extend presumption of persecution to an unmarried partner under *In re C-Y-Z*.¹⁴⁸

In considering and ultimately denying Chen's second appeal, the Seventh Circuit reviewed the immigration judge's holding directly, as the BIA summarily affirmed the immigration judge's decision without issuing an opinion.¹⁴⁹ The court embarked on an extensive review of other circuits that have addressed the issue of asylum rights for unmarried one-child policy refugees, and agreed with the decisions in the Third and Fifth Circuits granting *Chevron* deference to the BIA's interpretation of the IIRIRA in *In re C-Y-Z*.¹⁵⁰ But despite this analysis, the court apparently based its final judgment against Chen on the immigration judge's adverse

planning officials and overturned tables. *Id.* When they called the police, he ran away and hid at a friend's house before escaping China. *Id.* at 12.

142. Snakeheads are human traffickers paid to help people like Chen leave China illegally. See generally Cleo J. Kung, Comment, *Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the U.S. Statutory Definition of "Refugee,"* 90 J. Crim. L. & Criminology 1271 (2000).

143. *Chen*, 152 F. App'x at 529.

144. *Id.*

145. *Id.*

146. *Id.* See *supra* note 96 for an argument that determination of the credibility of Chen's statements should have been made independently of his inability to provide documentary evidence—i.e., the lack of corroborating evidence in and of itself was not a proper ground for the immigration judge to make an adverse credibility finding.

147. *Chen*, 152 F. App'x at 529.

148. *Id.* at 528. In summary affirmations, one Board Member simply affirms the results reached by the immigration judge without opinion. 8 C.F.R. § 1003.1(c)(4) (2005).

149. *Chen*, 152 F. App'x at 529-30. The Seventh Circuit reviewed the immigration judge's decision for a "specific, cogent" rationale for its finding, supported by "reasonable, substantial, and probative evidence on the record considered as a whole." *Id.* at 530 (citing *Krouchevski v. Ashcroft*, 344 F.3d 670, 673 (7th Cir. 2003)). This court would uphold an immigration judge's adverse credibility finding if discrepancies in the applicant's testimony go to the heart of his claim. *Uwase v. Ashcroft*, 349 F.3d 1039, 1043 (7th Cir. 2003); *Ceballos-Castillo v. INS*, 904 F.2d 519, 520 (9th Cir. 1990). The Real ID Act of 2005 lowered this standard, so that judges can base credibility determinations on minor discrepancies that do not go to the heart of the asylum claim. See *supra* note 96.

150. *Chen*, 152 F. App'x at 530. But see *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006), in which the same court recognized that an applicant who participated in a traditional marriage that was not legally registered qualified as a spouse for the purposes of asylum from China's one-child policy.

credibility determination.¹⁵¹ The Seventh Circuit held that even if the immigration judge erred in making an adverse credibility finding based solely on Chen's inability to provide corroborating evidence, "any such error made no difference here."¹⁵² Thus, the court denied Chen's application for asylum.¹⁵³ In cases involving both boyfriends and fiancés, the majority of circuit courts refuse to extend a presumption of persecution to Chinese refugees who were not officially married to the actual victims of the one-child policy in accordance with the BIA's decision in *In re C-Y-Z*.

*B. The Minority: No Deference to the BIA's Decision Restricting
Derivative Asylum Rights to Unmarried Couples*

Two circuits have taken a less deferential attitude towards marital status restrictions on asylum rights when considering applications from unmarried Chinese refugees based on their partners' forced sterilizations or abortions. At least one court has recognized the intent to marry as sufficient to establish the intimacy courts normally infer from a legal marriage. As such, the court simply refers to the couple as husband and wife, even though this terminology is technically inaccurate. This section considers cases from the Ninth and Second Circuits declining to defer to the BIA's restrictive interpretation in *In re C-Y-Z*, which extends a presumption of persecution only to legally married spouses.

1. The Ninth Circuit in Ma v. Ashcroft

The Ninth Circuit recognized the status of a Chinese refugee who participated in a traditional, but not legal, marriage ceremony and granted him asylum based on his "wife's" forced abortion. The applicant in *Ma v. Ashcroft*¹⁵⁴ married his "wife" in a traditional ceremony, but because of their age at the time, the couple could not legally register their marriage

151. *Chen*, 152 F. App'x at 530 ("We need not decide this issue [whether to defer to the BIA's interpretation of *In re C-Y-Z* as applying only to married couples] definitively, however, because Chen's petition failed for a more fundamental reason: an adverse credibility determination.").

152. *Id.* at 530. The court offered no further explanation as to why the immigration judge's error would not be harmful to Chen, when it seemingly affirmed his asylum denial because of the adverse credibility finding below. *Id.* It is debatable whether the court strictly applied the stated standard of review when it devoted only one sentence in the opinion, with no supporting analysis, to the question of credibility—the issue on which both the immigration judge and the Seventh Circuit rested their decisions. *Id.*; see *supra* note 149. Perhaps the court's true motivation for rejecting Chen's petition was in fact its agreement that courts should defer to the BIA's interpretation of the IIRIRA.

153. Although it decided *Chen* on other grounds, the Seventh Circuit has continued to deny asylum to unmarried Chinese one-child policy applicants since reviewing this case. See, e.g., *Lu v. Gonzales*, No. 05-2110, 2006 U.S. App. LEXIS 25132 (7th Cir. Oct. 5, 2006) (denying petitioner's asylum claim because the IIRIRA has not been interpreted as extending to the boyfriends of Chinese nationals who were forced to undergo an abortion after violating the one-child policy); *Zhu v. Gonzales*, 465 F.3d 316 (7th Cir. 2006) (holding that boyfriends are not entitled to a presumption of persecution under the IIRIRA).

154. 361 F.3d 553 (9th Cir. 2004).

with the Chinese government.¹⁵⁵ Two months later, Kui Rong Ma's partner became pregnant; afraid that the pregnancy would be forcibly terminated as punishment for violating of the one-child policy, Ma's partner hid from government officials.¹⁵⁶ Ma then attempted to register their traditional marriage, but local officials denied Ma's application.¹⁵⁷ The registration attempt alerted officials to the couple's underage relationship, and they thus discovered Ma's partner's pregnancy.¹⁵⁸ When Ma refused to tell birth control cadres where his partner was hiding, they beat him and arrested his father.¹⁵⁹ Ma's partner eventually heard of the arrest and came out of hiding to plead for the father's release; instead, local officials seized her and forcibly aborted her child in the third trimester.¹⁶⁰ Ma then smuggled himself¹⁶¹ to the United States and applied for asylum.¹⁶²

The immigration judge granted Ma's application for asylum on the basis of his traditional marriage, even though the couple never legally married.¹⁶³ The judge characterized the couple as having what would be a common law marriage¹⁶⁴ in the United States, and concluded that there was no logical or statutory reason to exclude common law spouses from the protection of the IIRIRA.¹⁶⁵ Thus, the immigration judge expanded the BIA's ruling in *In re C-Y-Z-* to grant a presumption of persecution to a traditionally, but not legally, married man based on his "wife's" forced abortion.

The Immigration and Naturalization Service filed a notice of appeal in Ma's case, asserting that only legally married spouses fulfill *In re C-Y-Z-*'s marriage requirement for imputed persecution.¹⁶⁶ The BIA agreed, refusing

155. Kui Rong Ma was nineteen and his partner was twenty-one at the time of their traditional ceremony. *Id.* at 555. The couple would not have been able to marry legally for three more years, when Ma turned twenty-two. See *supra* note 29 and accompanying text.

156. *Ma*, 361 F.3d at 555. See *supra* note 28 for a discussion of the role of China's Marriage Law in its overall population control policy and the implications of out-of-wedlock pregnancies for Chinese couples.

157. Ma testified that he tried to register his marriage so he could live legally with his partner. *Ma*, 361 F.3d at 555.

158. *Id.*

159. *Id.*

160. *Id.* at 556. Officials also levied a 5000 RMB fine on the couple for disobeying the one-child policy. *Id.*

161. *Id.* Both Ma and his partner wanted to leave China, but Ma left first so he could establish himself in the United States before bringing her to join him overseas. *Id.*

162. In support of his application for asylum, Ma submitted documentation showing that his partner had had an abortion, a receipt for the 5000 RMB fine, and a picture of the couple. *Id.* The immigration judge found his testimony and documentary evidence to be credible. *Id.*

163. *Id.*

164. Common law marriage occurs when a couple agrees to be and holds themselves out as married without registering for a marriage license. See, e.g., *Taegen v. Taegen*, 61 N.Y.S.2d 869, 873 (Sup. Ct. 1946). In order to determine the existence of a common law marriage, the court may consider evidence that the parties consented to be married, cohabited, and represented themselves as married. *Id.* Only thirteen states and the District of Columbia legally recognize common law marriages today. Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 Cornell L. Rev. 45, 75 n.235 (1981).

165. *Ma*, 361 F.3d at 556.

166. *Id.* at 557.

to apply *In re C-Y-Z-* to unmarried partners of Chinese nationals who have undergone forced abortion or sterilization.¹⁶⁷ The BIA contended that Ma's inability to legally marry his partner was not connected to China's coercive population control policy.¹⁶⁸ In essence, the BIA reasoned that "although a husband whose marriage is registered with the state may obtain refugee status on the basis of his wife's sterilization or abortion, a husband whose marriage is not so registered, because China's coercive population control policy prohibits registration, may not."¹⁶⁹ The BIA revoked Ma's grant of asylum.¹⁷⁰

Ma collected more evidence to submit to the BIA in an attempt to persuade the Board to reopen and reconsider his case. During his detention, Ma had turned twenty-two, the legal age to marry in China.¹⁷¹ He submitted an official document recognizing his "de facto" marriage along with a document from the Chinese Communist Party detailing how the Marriage Law intersected with the country's population control program.¹⁷² Despite his efforts, the BIA again denied Ma's asylum claim, declining to recognize Ma and his partner as legally married as required by *In re C-Y-Z-*.¹⁷³

Ma appealed the BIA's judgment to the Ninth Circuit. Although the Third, Fifth, and Seventh Circuits all deferred to the BIA's decision limiting the scope of *In re C-Y-Z-* to married couples in accordance with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,¹⁷⁴ the Ninth Circuit took a different approach. Whereas those circuits found that the BIA's interpretation of the IIRIRA passed *Chevron's* step two "arbitrary or capricious" test,¹⁷⁵ the Ninth Circuit disagreed. It felt free to disregard the BIA's opinion in *In re C-Y-Z-* because

[t]he BIA's refusal to grant asylum to an individual who cannot register his marriage with the Chinese government on account of a law promulgated as part of its coercive population control policy, a policy

167. *Id.* The BIA reached this decision in a 2-1 Board vote. The dissent would have applied a different standard of proof to determine whether Ma was entitled to a presumption of persecution, one based on the closeness of the couple's relationship, not documentary proof. *Id.* The dissenting Board Member stated,

[T]here is absolutely no doubt about the relationship between the respondent and his "common law spouse." Whether or not the persecuting country, China, would decline to recognize the marriage on technical grounds, because the respondent was under the age of [twenty-two], has little, if anything, to do with this asylum application.

Id. at 557 (Schmidt, Board Member, dissenting) (alteration in original).

168. *Id.* at 557.

169. *Id.* at 558.

170. *Id.* at 557.

171. *Id.*

172. *Id.*

173. *Id.*

174. 467 U.S. 837 (1984). See *supra* Part II.A.1 for a discussion of the Third Circuit's application of *Chevron*.

175. See *supra* notes 125-26 and accompanying text.

deemed by Congress to be oppressive and persecutory, contravenes the statute and leads to absurd and wholly unacceptable results.¹⁷⁶

The court clarified that Congress intended the IIRIRA to provide relief for couples who were persecuted by the Chinese government in the name of population control.¹⁷⁷ Since the goal of early marriage restrictions is to shorten the period of time during which couples are both legally and biologically able to reproduce, the Marriage Law is “inextricably linked” to the one-child policy.¹⁷⁸ To deny asylum to an applicant who seeks relief from the Catch-22 of China’s coercive population control policy is “at odds not only with the provision at issue here, but also with significant parts of our overall immigration policy.”¹⁷⁹ Furthermore, the court noted that if the couple had fled China together, Ma’s “wife” would be entitled to asylum herself because she personally suffered the forced abortion, but her husband would be deported because he could not produce a legal marriage certificate.¹⁸⁰ Thus, the BIA’s rule in *In re C-Y-Z-* would separate a family on a technicality—an “absurd” result.¹⁸¹ The Ninth Circuit ruled in favor of Ma, extending the scope of *In re C-Y-Z-* to include traditionally married couples too young to legally register their marriage in China.¹⁸²

176. *Ma*, 361 F.3d at 559. The court cites issues of consistency and rationality in support of its decision not to defer to the BIA. *Id.* It notes that the courts do not give weight to the BIA’s judgment when it is unreasonable, contravenes Congress’s intent in passing immigration laws, or causes absurd results. *Id.* (citing *United States v. Wilson*, 503 U.S. 329, 334 (1992) (criticizing the district court’s interpretation of the federal pre-sentence detention credit statute because it would arbitrarily award credit to offenders based on the date they are sentenced); *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001)).

177. *Ma*, 361 F.3d at 560.

178. *Id.* In other words, a significant motivation behind the Chinese government’s ban on young marriages is an attempt to legally prevent those couples from having children. *Id.* Young couples who cannot legally marry, and thus single women, who conceive a child, regardless of the fact that they have no other children, violate the one-child policy. *Id.* Violators are subject to forced abortion or sterilization. *Id.*; see *supra* note 28.

179. *Ma*, 361 F.3d at 561. To deny Ma asylum based on the supposed legitimacy of China’s Marriage Law would contradict Congress’s express condemnation of the coercive population control program because the law is an important part of China’s overall policy restricting childbirth. *Id.* The Seventh Circuit reached a similar conclusion in *Zhang v. Gonzales*, 434 F.3d 993 (7th Cir. 2006). There, as in *Ma*, a couple participated in a traditional ceremony, but could not register the marriage due to their age. *Id.* at 995. The court held that a traditionally married applicant qualified as a spouse, noting that

Congress passed § 601(a)(1) of the IIRIRA to ensure that families who are victims of forced abortion and sterilization under China’s population control policy would receive asylum, yet the IJ [immigration judge] denied the claim precisely because that population control policy rendered the marriage illegal. That would entirely subvert the Congressional amendment, and deny asylum to anyone whose sterilization or abortion was set in motion by a decision to marry and procreate prior to the minimum age.

Id. at 999.

180. *Ma*, 361 F.3d at 561.

181. *Id.* It is significant that the court characterized the Mas as a family, despite the fact that he and his “wife” did not legally marry, because it recognized families as functional units instead of legal entities—a modern approach this Note endorses. See *infra* Part III.C.

182. *Ma*, 361 F.3d at 561.

2. The Second Circuit in *Lin v. United States Department of Justice*

Acknowledging the differing approaches other circuits have taken to determining the asylum rights of unmarried Chinese refugees claiming asylum based on a partner's forced sterilization or abortion, the Second Circuit chose to remand these cases to the BIA for clarification about the role marital status should play in asylum determinations.¹⁸³ In so doing, the Second Circuit, like the Ninth Circuit, declined to defer to the BIA's decision in *In re C-Y-Z-*. In *Lin v. United States Department of Justice*,¹⁸⁴ two boyfriends and a fiancé challenged immigration judges' rejections of their asylum applications based on their respective partners' forced abortions in China. In his application, petitioner Shi Liang Lin claimed that his girlfriend was forced to undergo an abortion because the two could not legitimize their relationship by getting married, as they were too young.¹⁸⁵ Petitioner Xian Zou made a similar claim, but also argued that officials threatened him when he vocally protested his girlfriend's abortion.¹⁸⁶ Petitioner Zhen Hua Dong based his asylum application on the facts that local officials forced his fiancée to undergo two abortions and threatened to sterilize and fine him if she became pregnant again.¹⁸⁷ Immigration judges denied all three applications based on *In re C-Y-Z-*'s legal marriage requirement for imputed persecution in one-child policy cases.¹⁸⁸ The BIA summarily affirmed the immigration judges' ruling for each of the three applicants.¹⁸⁹

These applicants appealed their cases to the Second Circuit. As the BIA affirmed their asylum denials without opinion, the Second Circuit reviewed the immigration judges' decision directly.¹⁹⁰ Although *Chevron* would require the Second Circuit to defer to the BIA's interpretation of the IIRIRA,¹⁹¹ here the court reviewed only the immigration judge's interpretation.¹⁹² The court found that immigration judges' statutory interpretations cannot be considered rules carrying the force of law to which *Chevron* would require it to defer.¹⁹³ Thus, in *Lin*, the Second

183. *Lin v. U.S. Dep't of Justice*, 416 F.3d 184, 192 (2d Cir. 2005).

184. *Id.*

185. *Id.* at 188.

186. *Id.* at 188 n.2. The immigration judge did not make a credibility determination as to Xian Zou's testimony regarding his girlfriend's forced abortions. *Id.*

187. *Id.* at 189. The immigration judge found Zhen Hua Dong's testimony to be credible. *Id.*

188. *Id.* at 188-89.

189. *Id.* at 189. See *supra* note 148 (explaining the summary affirmation process).

190. See *supra* note 149. Compare the Second Circuit's non-deferential approach to reviewing immigration judge opinions with that of the Seventh Circuit in *Chen v. Gonzales*, discussed *supra* Part II.A.3.

191. *Lin*, 416 F.3d at 189.

192. *Id.* at 190.

193. *Id.* at 191 ("[W]hen a court of appeals is faced with a BIA's summary affirmation, the court has no way of knowing that the BIA has, in fact, adopted the IJ's particular construction of a statute when the court is asked to assess its reasonableness. . . . [N]either the BIA, nor the IJs, treat summary affirmances as binding in any event. There is, in sum, no reason to believe that an IJ's summarily affirmed decision contains the sort of

Circuit did not defer to the immigration judges' determinations that the applicants could not win asylum based on their unmarried partners' forced abortions.¹⁹⁴

Although the Second Circuit declined to defer to the immigration judges' decisions, it was ill-equipped to embark on a *de novo* review because the BIA had not adequately explained its rationale for extending the IIRIRA to include imputed persecution for legally married couples and those couples alone.¹⁹⁵ Instead, the court remanded this case to the BIA to: (1) "articulate a reasoned basis for making spouses eligible for asylum under IIRIRA § 601(a)" and (2) "clarify whether, when, and why boyfriends and fiancés may or may not similarly qualify as refugees under IIRIRA § 601(a)."¹⁹⁶ While waiting for the BIA to issue clarification of *In re C-Y-Z-*, the Second Circuit continued to remand cases involving unmarried Chinese applicants to the BIA.¹⁹⁷

C. One More Try—Reconsidering *In re C-Y-Z-*

More than a year after the Second Circuit remanded *Lin*, and nine years since its original decision in *In re C-Y-Z-*, the BIA revisited the issue of imputed persecution for married spouses and clarified the status of unmarried Chinese refugees. This section presents the BIA opinion in *In re S-L-L-*,¹⁹⁸ reaffirming its position that *In re C-Y-Z-* extends the reach of the IIRIRA to include married refugees whose partners have undergone forced abortion or sterilization for violating China's one-child policy.¹⁹⁹

The BIA upheld its previous decision extending derivative asylum rights to married Chinese couples persecuted by coercive family planning measures.²⁰⁰ However, the BIA clarified that the presumption of persecution should be limited to spouses who actually opposed the other

authoritative and considered statutory construction that *Chevron* deference was designed to honor. As a result, we decline to extend *Chevron* deference to any statutory construction of the [IIRIRA] set forth in a summarily affirmed IJ opinion."). The immigration judge's interpretation of ambiguous provisions in immigration law is entitled to "no more deference than the inherent persuasiveness of the IJ's view commands." *Zhang v. Gonzales*, 426 F.3d 540, 544 (2d Cir. 2005); see *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

194. *Cf. Zhang v. INS*, 386 F.3d 66, 73 (2d Cir. 2004) (deferring to the BIA's interpretation of *In re C-Y-Z-* in a case where the asylum applicant claimed to be married).

195. *Lin*, 416 F.3d at 191; see *supra* note 104 and accompanying text.

196. *Id.* at 187.

197. See, e.g., *Pan v. U.S. Attorney Gen.*, 449 F.3d 408 (2d Cir. 2006); *Deng v. Gonzales*, 169 F. App'x 600 (2d Cir. 2006).

198. 24 I. & N. Dec. 1 (B.I.A. 2006).

199. *Id.* at 4.

200. *Id.*

spouse's forcible sterilization or abortion.²⁰¹ The BIA offered two arguments in support of its holding. First, according to the BIA, Congress intended section 601 of the IIRIRA to redress not only physical persecution wrought under the one-child policy, but also the Chinese government's intrusion into marital relationships.²⁰² "When the government intervenes in the private affairs of a married couple [i.e., decisions regarding children and family] to force an abortion or sterilization, it persecutes the married couple as an entity."²⁰³ Furthermore, the BIA adopted the "sympathetic suffering" argument first proposed by Judge Alito—that a husband experiences suffering that rises to the level of persecution when his wife undergoes forced sterilization or abortion.²⁰⁴ As such, persecution of one half of the marital unit can be imputed to the other.²⁰⁵

But, the BIA would not impute persecution in cases involving unmarried couples. It reasoned that

the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father. . . . [A] husband shares significantly more responsibility in determining . . . whether to bear a child in the face of societal pressure and government incentives than does a boyfriend or fiancé for the resolution of a pregnancy of a girlfriend or fiancée.²⁰⁶

The BIA also cited problems of proof in support of its exclusion of unmarried couples under *In re C-Y-Z-*. For example, it would be difficult for immigration judges to determine whether the unmarried applicant was the father of an aborted child, whether local officials held the applicant responsible for violating the one-child policy, and whether the applicant and the actual victim had a legitimately close relationship.²⁰⁷ The BIA

201. *Id.* For example, the unlikely husband who encouraged his wife to submit to a forced abortion or sterilization would not qualify for asylum based on his wife's persecution. See *supra* note 103 (analyzing Board Member Filppu's concurrence in *In re C-Y-Z-*). However, a spouse need not prove that he or she personally protested the forced abortion or sterilization; unless there is evidence to the contrary, the BIA infers opposition from the marital relationship. *In re S-L-L-*, 24 I. & N. at 8.

202. See *In re S-L-L-*, 24 I. & N. at 6. It is not clear how the BIA extrapolated this statement of intent. The BIA even goes so far as to state that Congress intended the IIRIRA's refugee definition to encapsulate legally married spouses. *Id.*

203. *Id.* The BIA recognized that the loss of a child and the infringement on the married couple's reproductive rights caused by forced abortion constitutes persecution of both husband and wife. See *id.* at 8.

204. *Id.* at 7; see *supra* note 105 and accompanying text.

205. See *In re S-L-L-*, 24 I. & N. at 8 ("When parties have legally committed to marriage, we recognize the requisite nexus and level of harm for past persecution when a spouse is forced to undergo an abortion or sterilization procedure.").

206. *Id.* at 9. In essence, the BIA characterizes children of married couples as planned, but children of unmarried couples as unwanted surprises. Cf. *id.* at 11 (noting that when petitioner Shi Liang Lin's girlfriend told him that she "felt like being pregnant," the underage couple applied for a marriage license so they could legally start a family and then applied for and were denied permission to keep the illegal child when she later conceived).

207. *Id.* at 9-10. With a marriage certificate, the judge can simply infer paternity, liability, and intimacy. See *supra* notes 126-27 and accompanying text (summarizing Judge Alito's argument that using marriage as a proxy for specific proof promotes administrative

draws a clear line between married and unmarried couples seeking the protection of U.S. immigration law.

However, the BIA does present unmarried couples with a different avenue to pursue in asylum cases. An unmarried partner can try to show that he or she personally resisted the one-child policy.²⁰⁸ Resistance could include a showing of anything from general opposition to the partner's forced abortion or sterilization to specific attempts to prevent officials from enforcing the policy.²⁰⁹ Beyond proving resistance, the unmarried applicant must also show that he or she has personally suffered harm rising to the level of persecution due to the government's population control program.²¹⁰ Upon such a showing, an unmarried Chinese refugee can establish an independent claim for asylum.²¹¹ After repeated requests,²¹² in *In re S-L-L-* the BIA issued specific guidance for the courts to follow in considering asylum applications from unmarried Chinese refugees premising their persecution on a partner's forced abortion or sterilization.

It remains to be seen how courts will interpret the BIA's reaffirmed opinion that only married couples are entitled to a presumption of persecution in Chinese one-child policy asylum applications. Certainly, the majority of courts will not change their position; *In re S-L-L-* validates the decisions in *Chen v. Ashcroft*,²¹³ *Zhang v. Ashcroft*,²¹⁴ and *Chen v. Gonzales*.²¹⁵ The Ninth Circuit is likely to treat *In re S-L-L-* as disdainfully as it did *In re C-Y-Z-*, as the BIA again failed to take into account the role played by marriage age requirements in one-child policy violations.²¹⁶ The

efficiency and convenience). The BIA dismissed an argument proposed by many unmarried applicants: The couple would have legally married but for the marriage law, promulgated as part of China's population control policy. *See, e.g., Chen v. Ashcroft*, 381 F.3d 221, 229-30 (3d Cir. 2004). The BIA agreed that this is a sympathetic argument, but held that "rational reasons" such as administrative convenience justify restricting *In re C-Y-Z-* to married couples. *In re S-L-L-*, 24 I. & N. at 12.

208. *In re S-L-L-*, 24 I. & N. at 10.

209. *Id.*

210. To determine the individual harm suffered by one partner when the other undergoes forced sterilization or abortion, immigration judges could consider factors such as whether the unmarried couple

has [illegal] children together, has cohabited for a significant length of time, holds themselves out to others as a committed couple, has taken steps to have their relationship recognized in some fashion (perhaps having taken such steps repeatedly, as where permission to marry has been denied by authorities based on failure to meet the minimum age requirements), is financially interdependent, and whether persuasive objective evidence of that relationship's continued existence during the time that the applicant has been in the [United States] is presented.

Id. at 10-11 (alterations omitted).

211. In his case, petitioner Lin was not legally married and could not make out an independent claim of persecution because "[m]erely impregnating one's girlfriend does not constitute an act of resistance." *Id.* at 11. Therefore, the BIA again rejected his asylum application.

212. *See supra* note 104 and accompanying text.

213. 381 F.3d 221 (3d Cir. 2004).

214. 395 F.3d 531 (5th Cir. 2004).

215. 152 F. App'x 528 (7th Cir. 2005).

216. *In re S-L-L-*, 24 I. & N. at 12.

Second Circuit's view is unknown.²¹⁷ Absent a fundamental change in immigration law, or in how courts view marriage and families, asylum applications of unmarried Chinese asylum applicants are likely to fail.

III. ASYLUM RIGHTS FOR THE UNMARRIED PARTNERS OF CHINESE NATIONALS WHO FLEE COERCIVE FAMILY PLANNING MEASURES

This part argues that U.S. courts should abandon *In re C-Y-Z*'s marital status restriction on Chinese nationals fleeing the one-child policy. It advocates individual findings of fact regarding persecution for all people seeking refuge in the United States—married or unmarried. Part III.A posits that abandoning marital status restrictions on one-child policy asylum exemplifies Congress's intent in passing the IIRIRA. Part III.B questions traditional policy arguments in support of marital status limitations. Part III.C scrutinizes the underlying preference for traditional families that motivates many asylum rejections. Part III.D assesses the asylum options currently available to unmarried Chinese applicants and determines that alternatives are inadequate; derivative asylum rights are crucial to ensure their protection. Extending asylum to the unmarried partners of Chinese nationals who come to the United States to avoid coercive family planning measures upholds Congress's intent in passing the IIRIRA and simultaneously avoids mistaken conceptions of families, floodgates, and fraud.

A. Congress Intended the IIRIRA to Protect a Broad Class of Refugees

The IIRIRA expresses Congress's intent to make a strong statement criticizing the Chinese government's human rights abuses. This section maintains that ending the immigration system's reliance on marital status to determine persecution would ensure that many deserving applicants win asylum, thus fulfilling Congress's objectives for the IIRIRA.

Faced with public outrage over the Tiananmen Square massacre and the one-child policy, two Presidents, their Attorneys General, and Congress tried for seven years to pass legislation opening U.S. borders to victims of Chinese governmental policies.²¹⁸ These lawmakers finally condemned China's human rights abuses in 1996 by creating a specific grant of asylum to victims of coercive population control.²¹⁹ Singling out Chinese refugees fleeing the one-child policy as a group requiring special protection is a testament to Congress's intent to create a broad grant of asylum to this class of persons.

217. The Second Circuit granted a rehearing of Lin's case in November 2006. *Lin v. U.S. Dep't of Justice*, No. 02-4611, 2006 U.S. App. LEXIS 28465 (2d Cir. Nov. 13, 2006).

218. See *supra* Part I.C.

219. See *supra* note 82 and accompanying text (outlining the IIRIRA's amended definition of refugee).

Despite international censure, the one-child policy continues to oppress Chinese citizens.²²⁰ Demand for asylum quickly outpaced the 1000 slots the IIRIRA originally reserved for its victims.²²¹ Recognizing that the 1996 legislation did not adequately protect this class of Chinese nationals, in 2005 Congress strengthened the United States' commitment to asylum for these refugees by removing the cap.²²² Even if the IIRIRA was originally intended as a limited response to China's human rights abuses, the 2005 changes erased all doubt that Congress now intends to accept all deserving asylum applicants.²²³

The BIA's assertion that Congress intended the IIRIRA to cover married, but not unmarried, couples²²⁴ is completely unfounded. As the Ninth Circuit averred, Congress intended the law of asylum to protect "couples."²²⁵ Although the BIA has interpreted this statement to mean "married couples and married couples only," a more reasonable interpretation would be that Congress intended to protect "parents." Congress's statement neither explicitly nor implicitly includes a marriage requirement. Even if Congress believes that parents should be married, one cannot reasonably conclude that U.S. lawmakers meant to punish those who choose not to marry or, more likely, cannot legally marry in China.²²⁶ Congress intended quite simply to protect a class of persons who have lost a child as punishment for violating China's family planning law—this class naturally includes married and unmarried couples.²²⁷ The BIA and federal court decisions excluding refugees based on marital status contradict the spirit and purpose of Congress's mandate.

B. The Circuit Courts' Policy Concerns Are Not Compelling Justifications for Turning Unmarried Refugees Away at the Border

Several courts, particularly the Third Circuit, worried that broadly construing *In re C-Y-Z-* to apply to unmarried Chinese couples would cause

220. See *supra* note 37. The Chinese government has pledged to keep the one-child policy in force for the foreseeable future. See *supra* note 3 and accompanying text.

221. See Ruth Ellen Wasem, Cong. Research Serv., U.S. Immigration Policy on Asylum Seekers 16-17 (2005), available at <http://www.fas.org/sgp/crs/misc/RL32621.pdf> (noting that in 2003 over 7000 qualified people awaited coercive population control asylum status).

222. See *supra* notes 83-85 and accompanying text.

223. Notably, almost all of the cases discussed in Part II arose after the passage of the Real ID Act.

224. See *In re S-L-L-*, 24 I. & N. Dec. 1, 6 (B.I.A. 2006) ("Congress was concerned . . . with the obtrusive government interference into a married couple's decisions regarding children and family.").

225. H.R. Rep. No. 104-469(1), at 174 (1996) (quoted in *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004)).

226. See *supra* note 28 and accompanying text.

227. Looking at intent in this way reveals a disconnect between Congress's approach to the IIRIRA and its implementation by the courts. Congress considered the *level of harm* that most parents would undoubtedly experience when a child is forcibly aborted and determined that suffering, in general, constitutes persecution. Courts have focused instead on the *status* of the parents as a proxy for harm.

a mass influx of single men seeking to defraud the immigration system.²²⁸ This section asserts that these concerns do not justify denying asylum to otherwise deserving, but unmarried, Chinese applicants attempting to escape coercive population control measures.

Apprehension about “opening the floodgates” to masses of Chinese immigrants is misplaced. Considering the practical and financial difficulties these refugees, many of whom are quite young, face in reaching the U.S. border, a flood of new immigration seems unlikely.²²⁹ Statistics from 2003 show that only 7000 refugees applied for asylum based on coercive family planning measures;²³⁰ this is hardly an overwhelming number.²³¹ Even if extending asylum to unmarried one-child policy applicants caused a ten fold increase in the number of Chinese refugees admitted into the United States, the courts should not strain to avoid a result sanctioned by Congress based on their own notions of marriage and family. Given Congress’s decisive action lifting the cap on one-child policy grants of asylum, controlling the flow of new Chinese immigrants is not an appropriate judicial concern. Courts improperly cite population fears as a justification for restricting one-child policy immigration.

Courts’ fears of accepting fraudulent claims are similarly overblown. Any asylum applicant must make a credible showing to an immigration judge that he, she, or a spouse suffered persecution in China.²³² A marriage license is not the only possible way to prove a relationship with a victim of coercive family planning measures. In fact, the law clearly recognizes the difficulties refugees may have procuring official documents from persecutory home countries; thus, an applicant can establish a credible asylum claim based solely on his or her own testimony.²³³ If the judge requests corroborating or documentary evidence in support of the claim, an applicant can still win asylum if he or she can provide cogent reasons behind the lack of such evidence.²³⁴ Indeed, “fleeing” a persecutory home country implies that the refugee would not have packed supporting documentation before arriving in the United States. A refugee could credibly show the difficulty of extracting official documents from China’s carefully controlled bureaucracy; in contrast, refugees from war-torn or

228. *See supra* note 126.

229. *See* Brief for Respondent, *supra* note 132, at 3-4 (recounting how the then twenty-one year old Zhang had to borrow 34,500 RMB from friends and family in order to acquire a false passport from smugglers, which he used unsuccessfully in an attempt to enter the United States).

230. *See supra* note 85.

231. For comparison, the Department of Homeland Security received over 46,200 applications for asylum in 2003. Office of Immigration Statistics, Dep’t of Homeland Sec., Yearbook of Immigration Statistics: Refugees and Asylees 46 (2003), available at <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003RA.pdf>.

232. *See supra* note 96; *see also* Immigration and Naturalization Act, 8 U.S.C. § 1158(b)(1)(B) (2000); *In re C-Y-Z-*, 21 I. & N. Dec. 915, 919 (B.I.A. 1997).

233. *See supra* note 96 (discussing procedure for immigration judges in making credibility determinations).

234. *See supra* note 96.

developing nations could equally show their inability to procure official documents from a fragmented nation with little administrative infrastructure.²³⁵ Thus, the credibility determination in asylum hearings checks fraudulent claims.²³⁶ Even if an immigration judge insists on documentary proof to support, for example, a Chinese national's claim that he married his wife or that she underwent a forced abortion, documents certifying these events may just as likely be fraudulent or mistranslated.²³⁷ Problems of proof are inherent to immigration proceedings of all kinds; fraud is not a persuasive rationale for denying asylum to a particular class of Chinese asylum applicants.

Using marital status to combat fraud arbitrarily sets different credibility standards for similarly situated Chinese applicants. In some cases, "husbands" have won asylum based on their "wives'" forced sterilization or abortion even though their marriages were illegal in China.²³⁸ Thus, as long as an applicant asserts that he or she is married, the immigration judge assumes that part of the claim passes muster. From one simple assertion—i.e., "I am married"—an immigration judge infers credibility regarding the closeness of the relationship between the partners, the opposition of one spouse to the other's forced sterilization or abortion, a parental relationship between the applicant and the aborted child, and the extreme harm wrought on the applicant spouse.

Conversely, an applicant who truthfully and credibly claims a close relationship with an unmarried partner does not receive the benefit of a presumption of persecution.²³⁹ In a sense, the immigration system is saying that unmarried applicants are inherently not credible when claiming asylum due to a partner's forced sterilization or abortion, regardless of the quality of their testimony. Although immigration judges in all except one²⁴⁰ of the cases earlier discussed found the applicants' testimony about their relationships with the mothers of their children and the subsequent forced

235. See, e.g., *Hor v. Gonzales*, 421 F.3d 497, 501 (7th Cir. 2005) (agreeing that an asylum applicant from Algeria could not reasonably be expected to extract corroborating evidence as simple as newspaper articles or court documents when he fled his home country, which was governed by a military dictatorship at the time of his departure).

236. See Megan C. Dempsey, Note, *A Misplaced Bright-Line Rule: Coercive Population Control in China and Asylum for Unmarried Partners*, 92 Iowa L. Rev. 213, 239 (2006) (arguing that standard operating procedures for handling asylum claims, particularly the credibility finding, can detect and control fraud).

237. Document fraud is rampant in many immigration contexts, so much so that the House of Representatives proposed and passed legislation that would characterize document fraud by asylum seekers as an aggravated felony and would subject the applicant to deportation. See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 618 (2005).

238. See *Ma v. Ashcroft*, 361 F.3d 553, 559 n.8 (2004) (pointing out that the petitioners in *He v. Ashcroft*, 328 F.3d 593, 603-04 (9th Cir. 2003), *Qiu v. Ashcroft*, 329 F.3d 140, 144-45 (2d Cir. 2003), and *In re C-Y-Z-*, 21 I. & N. Dec. 915, 918 (B.I.A. 1997) all won asylum based on their "wives'" forced abortions even though their marriages were underage, unregistered, and thus illegal).

239. See *supra* Part II.B.1-3.

240. Petitioner Chen's case in the Seventh Circuit was arguably erroneously decided. See *supra* notes 146, 152 and accompanying text.

abortions to be credible,²⁴¹ only one actually received asylum.²⁴² Producing a piece of paper should not make one applicant's claim more deserving than another's.²⁴³ Courts' policy considerations should not compel the denial of asylum claims to otherwise deserving Chinese applicants.

C. Restricting Derivative Asylum Rights to Married Couples Reflects an Outdated View of the Family

Proponents of the marriage requirement might argue that judges are concerned not with the marriage license itself, but with the closeness of relationship the document signifies. Yet, the tone of many opinions rejecting unmarried one-child policy asylum claims shows a clear bias toward traditional marriages. This section suggests that the underlying motivation for marital status asylum restrictions is in fact a preconceived notion about what a family should be—a married mother and father with their child. Instead of rewarding couples who follow the traditional, legal route to marriage, the court should concern itself with the actual level of harm suffered by an applicant, regardless of the status of his or her relationship.

In *In re S-L-L*—particularly, the BIA's language evokes a derogatory attitude towards unmarried couples who have illegally conceived.²⁴⁴ In restricting the presumption of persecution to couples who “*actually* committed to a marital relationship,”²⁴⁵ the BIA indicated that it was concerned not with the closeness of relationship, but with the closeness of fit between the applicants and the mold of what “deserving” applicants should be. Furthermore, statements regarding the different (read: lesser) status of unmarried fathers reek of stereotype.²⁴⁶ There simply is no legitimate reason to deny individual asylum applications due to antiquated generalizations about unwed fathers as irresponsible partners who assume

241. Only petitioner Zhang could not fully persuade the immigration judge of his credibility. *See supra* note 134.

242. Petitioner Ma won asylum on the basis of his traditional marriage. *See supra* notes 162, 182 and accompanying text.

243. For an argument that all asylum applicants should be presumed credible based on a narrative recitation of the persecution they have suffered, see Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 Rutgers L. Rev. 127 (2000).

244. *See supra* notes 205-07 and accompanying text (describing the BIA's unwavering preference for married couples).

245. *In re S-L-L*, 24 I. & N. Dec. 1, 12 (B.I.A. 2006) (emphasis added).

246. *See generally* Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 Cornell J.L. & Pub. Pol'y 1 (2004) (discussing the modern recognition of parental rights of biological fathers, nonbiological fathers, married, and unmarried men); *see also* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 Am. J. Comp. L. 125, 125 (2006) (“Unwed fathers . . . are no longer categorically disregarded by the law.”).

no responsibility for their partners or children.²⁴⁷ A more modern conception of family recognizes functional units, not legal units.²⁴⁸ Parents are equally persecuted partners because they commit to a familial relationship, not because their relationship is sanctioned by the state. Basing asylum decisions on personal biases and stereotypes is unjust.

Consider Mr. Zhang: Because he and his partner could not marry, he could not produce either a marriage certificate or documentation proving that he fathered his girlfriend's aborted child.²⁴⁹ However, he helped her avoid family planning cadres for some time, paid the fine levied on her for their one-child policy violation, and even claimed persecution because he could not live with the person he loved and wished to marry.²⁵⁰ The immigration judge found his testimony regarding these facts to be credible, but still denied Zhang's asylum application because he was not entitled to a presumption of paternity without a marriage license.²⁵¹ Yet Mr. Zhang is not the picture of an irresponsible man fraudulently using his relationship for asylum. Shedding preconceived notions about nonmarital relationships would allow courts to reach the merits of individual asylum claims.

D. *"Other Resistance" Asylum Is a Hollow Alternative to Derivative Asylum Rights*

It remains to be seen whether unmarried applicants will be able to establish asylum based on their own resistance to the one-child policy under the guidelines proposed in *In re S-L-L-*. This section speculates that an unmarried Chinese applicant's chances of winning asylum after *In re S-L-L-* are no better than they were before. Instead, applicants who can establish the requisite level of harm should be entitled to derivative asylum rights regardless of marital status.

Pursuing *In re S-L-L-*'s "other resistance" option, which allows unmarried applicants to win asylum based on their own resistance to a partner's forced abortion or sterilization, is futile. Ironically, those guidelines essentially require that the applicant prove he or she participated in a common law marriage.²⁵² So, unmarried applicants cannot win asylum based on their partner's forced sterilizations or abortions because they are not married, but they can win asylum based on their own resistance to

247. See Brief for Petitioner-Appellant, *supra* note 141, at 13 ("A boyfriend who resists coercive birth control measures on his girlfriend has the same and an equally strong interest in the pregnancy of his girlfriend as a husband in his wife's.").

248. This definition of family underlies arguments in favor of same-sex marriage, assisted reproduction, and same-sex or single parent adoption. See, e.g., Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. Davis L. Rev. 305 (2006).

249. See *supra* note 134.

250. See *supra* note 132 and accompanying text; see also Brief of Petitioner-Appellant *supra* note 131, at 6.

251. See *supra* note 134 and accompanying text.

252. Compare *supra* note 164 (describing proof of common law marriage), with *supra* note 210 (describing factors to be considered in "other resistance" to coercive population control asylum cases).

coercive population control if they prove that they are, for all intents and purposes, married. This double standard is nonsensical.

Furthermore, the *In re S-L-L-* guidelines for proving individual resistance ask immigration judges to do exactly what they have so adamantly resisted in the past—to make individualized findings of fact regarding the closeness of the relationship between unmarried partners who have suffered persecution under China's coercive population control program.²⁵³ Why is the BIA willing to strictly scrutinize the petitions of unmarried Chinese refugees claiming asylum based on their own resistance, but is absolutely unwilling to do so in cases where the asylum claim is premised on a partner's forced sterilization or abortion? Given the immigration system's high priority on administrative convenience,²⁵⁴ it is doubtful that judges will be willing and able to engage in this intricate, and admittedly difficult, task for people they consider to be lesser situated. There is no reason to set different standards for married and unmarried Chinese applicants making the same claim when both can credibly testify to persecution and to the closeness of their relationship with their partners if given the chance.

Additionally, *In re S-L-L-* sets an unworkable standard for unmarried Chinese nationals premising their asylum claim on the "other resistance to coercive population control" prong of the IIRIRA.²⁵⁵ The BIA requires the applicant to show a nexus between his or her individual resistance to a partner's forced sterilization or abortion and China's family planning law.²⁵⁶ However, the statute does not define the term resistance. The BIA suggests that "expressions of general opposition, attempts to interfere with enforcement of government policy in particular cases, and other overt forms of resistance to the requirements of the family planning law" would suffice.²⁵⁷ But, if past decisions are any indication, Chinese applicants face an insurmountable task in proving resistance. First, unmarried applicants must credibly testify that they took some affirmative action of resistance when the Chinese government ordered their partners to undergo forced sterilization or abortions;²⁵⁸ requesting permission for early marriage or

253. Congress contemplated the need for rigorous fact finding when creating new asylum rights for one-child policy victims. Arguably, the immigration judges' failure to give claims from unmarried Chinese nationals due consideration is not a result Congress would sanction. See H.R. Rep. No. 104-469(1), at 174 (1996) ("Determining the credibility of the applicant and whether the actual or threatened harm rises to the level of persecution is a difficult and complex task, but no more so in the case of claims based on coercive family planning than in cases based on other factual situations. Asylum officers and immigration judges are capable of making such judgments.").

254. See *supra* notes 127-28 and accompanying text.

255. IIRIRA § 601(a)(1), 8 U.S.C. § 1101(a)(42)(B) (2000).

256. See *supra* note 205.

257. *In re S-L-L-*, 24 I. & N. Dec. 1, 10 (B.I.A. 2006).

258. But note that a petitioner like Chen, who verbally berated family planning officials, overturned tables, and openly protested his girlfriend's forced abortion, still could not qualify for asylum based on his own resistance because the immigration judge characterized his testimony as "vague" and thus not credible. See *supra* note 141 and accompanying text.

childbirth is insufficient.²⁵⁹ Additionally, unmarried applicants must establish that they suffered harm equivalent to persecution due to a partner's forced sterilization or abortion.²⁶⁰ But it is unlikely that many unmarried applicants, if any, could show that they have other children with their partners or that they made multiple requests that the government waive its marriage and birth regulations. The one-child policy was designed to prevent unmarried couples from having any children;²⁶¹ if a couple did somehow have children, waiver requests would only invite government scrutiny of their many one-child policy violations. If they requested permission to have an illegal child, the government would plainly force them to abort it.²⁶² For most unmarried Chinese applicants, *In re S-L-L*'s "other resistance" option is no option at all.

Moreover, the *In re S-L-L* "other resistance" asylum opportunity does nothing for those applicants who, like Mr. Lin, wanted to make their relationships official, but did not satisfy China's age requirements for legal marriage.²⁶³ In dismissing the argument that marital prohibitions, a vital part of the one-child policy, prevented the applicant's compliance, the BIA paints a picture of unmarried couples who remain so purely by choice, not by law.²⁶⁴ The courts should critically examine the lose-lose situation young couples face in China, and factor this into the evaluation of persecution. Until they do so, these unfortunate petitioners must return to China in the name of administrative convenience.²⁶⁵

Given Congress's dedication to reproductive freedom in China and its censure of international human rights abuses, the risk that a refugee suffered or will suffer persecution due to China's coercive family planning measures should outweigh the risks of granting asylum based on a fraudulent claim, opening U.S. borders to a flood of Chinese refugees, or compromising traditional notions of family.

259. See *In re S-L-L*, 24 I. & N. at 11. Considering the harsh punishments, including fines and imprisonment, levied on people who defy the one-child policy, many violators might reasonably choose not to resist in order to minimize these consequences. See *supra* Part I.B.2. Furthermore, requesting population control waivers often alerts officials to underage relationships and illegal pregnancies; thus, an attempt to comply with the one-child policy results in persecution just as more overt defiance does. See *supra* notes 157-60 and accompanying text (describing the consequences of petitioner Ma's registration attempt). While unmarried partners must individually and affirmatively oppose government authorities, a married man need only impregnate his wife to qualify for asylum. Cf. *supra* note 211 ("Merely impregnating one's girlfriend does not constitute an act of resistance.").

260. See *supra* note 210.

261. See *supra* note 30 and accompanying text.

262. In fact, this is exactly what happened in petitioner Ma's case. See *supra* notes 158-60 and accompanying text.

263. See *supra* note 185 and accompanying text.

264. See *supra* note 207. The BIA characterizes derivative asylum claims for married spouses as legitimate because they "actually" committed to a legal marriage. *In re S-L-L*, 24 I. & N. at 12. This implies that couples who made the effort to legalize their relationship are more intimate or more deserving than couples who tried and failed or simply chose not to marry.

265. See *supra* note 207.

CONCLUSION

The one-child policy continues to devastate Chinese nationals and inhibit their ability to exercise basic human rights. The United States has taken considerable strides toward providing a safe haven for victims of China's coercive population program. As a first step, the IIRIRA opened U.S. borders to applicants who personally suffered forced abortion or sterilization. The BIA doubled the number of Chinese nationals offered refuge in the United States by interpreting the IIRIRA to provide derivative asylum rights for the spouses of people who suffered forced abortion or sterilization. Having come this far, justice demands one further step: The United States should extend derivative asylum rights to Chinese nationals fleeing the one-child policy, regardless of marital status. Unmarried applicants deserve the right to present their cases for asylum based on a partner's forced abortion or sterilization, even if this consideration requires thorough fact-finding efforts by immigration judges. Instead of using marital status as a proxy, courts should undertake individualized findings of fact about the closeness of relationship and the actual harm suffered by unmarried applicants when making asylum rulings. An unmarried Chinese applicant who credibly demonstrates he or she has experienced harm rising to the level of persecution when a partner underwent forced abortion or sterilization is entitled to the protection of the IIRIRA.

Notes & Observations